Supreme Court, U.S.
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No. 96-1712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

DIONNE STAPLES,
Petitioner,

v.

MICHAEL P. KELLY, JOHN T. KELLY, and the Secretary, United States Department of Housing & Urban Development,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a circuit court of appeals reviewing a decision of an Administrative Law Judge in a proceeding arising under the Fair Housing Act and amendments thereto must adopt a decision of an Administrative Law Judge that fails to address agency delay, misconduct, due process violations, obstruction of justice and perjured testimony.

2. Whether a circuit court of appeals reviewing a decision of an Administrative Law Judge in a proceeding arising under the Fair Housing Act and amendments thereto must ignore agency misconduct, delay, due process violations, obstruction of justice and perjured testimony.

3. Whether a circuit court of appeals has authority to make a decision consistent with a prior mandate of the Court of Appeals or is required to adopt findings of an Administrative Law Judge that violates the mandate.

PARTIES TO THE PROCEEDING

Petitioner is Dionne Staples, an individual.

Respondents are Michael P. Kelly, an individual, John T. Kelly, an individual, and The Secretary of Housing and Urban Development.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR DENYING THE WRIT 12

A. The Petitioner's Appeal is Time Barred 12

B. Decision in Kelly II Does Not Conflict with N.L.R.B. v. Rutter Rex or Curtis v. Loether 13

C. No Conflict with Decisions in Other Courts 15

D. Decision Below Does Not Conflict with Intent of Congress 15

E. The Court of Appeals' Decision Conforms with the Law 16

F. No High Importance 17

CONCLUSION 19

APPENDIX

Appendix A
September 21, 1995 Decision on Attorney Fees of Administrative Law Judge Thomas C. Heinz A1

Appendix B
May 19, 1992 Order Quashing Subpoenas by Administrative Law Judge Alan W. Heifetz A17

Appendix C
May 21, 1992 Order Denying Motions to Dismiss of Michael P. Kelly and John T. Kelly by Administrative Law Judge Thomas C. Heinz A21

Appendix D
August 16, 1994 Order Requiring Briefs Upon Sixth Circuit Remand by Administrative Law Judge Thomas C. Heinz A30

Appendix E
Statutes A36

Appendix F
Code of Federal Regulations A47

Appendix G
Answer of John T. Kelly and Michael P. Kelly A58

Appendix H
Motions to Dismiss of John T. Kelly and Michael P. Kelly A78

TABLE OF AUTHORITIES

Cases

Baldwin County Welcome Center v. Brown,
466 U.S. 147 (1984) 15

Baumgartner v. HUD,
960 F.2d 572 (6th Cir. 1992) 16 fn10

Curtis v. Loether,
415 U.S. 189 (1974) 14

Hallstrom v. Tillamook County,
493 U.S. 20 (1989) 14

Kelly v. HUD,
3 F.3d 951 (6th Cir. 1993) 12,13

Kelly v. HUD,
97 F.3d 188 (6th Cir. 1996) 12,13

Mobasco Corp. v. Silver, 447 U.S. 807 (1980) . . . 15,16

N.L.R.B. v. J.H. Rutter Rex Manufacturing Co.,
396 U.S. 258 (1969) 13,14

Statutes

28 U.S.C. §1254(1) 2
42 U.S.C. §3610(B)(iv) 15
42 U.S.C. §3610(c) 15

Other References

24 CFR 103.45 14

Respondents Michael P. Kelly and John T. Kelly respectfully urge this Court to deny the Petition for Writ of Certiorari filed in this action by Dionne Staples.

OPINIONS BELOW

Petitioner Staples seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit reported at 97 F.3d 118 (6th Cir. 1996) (Petitioner's Appendix A), which reversed the Initial Decision on Remand as to damages, affirmed an award of attorney fees in the sum of Thirty Thousand Six Hundred Fifty-two and 46/100 Dollars ($30,652.46) plus Two Hundred Sixty-two and 46/100 Dollars ($262.46) to Staples and reversed the denial of fees to the Respondents, Kellys. Additionally the Administrative Law Judge issued a decision on attorney fees dated September 21, 1995 that was timely appealed to the United States Court of Appeals for the Sixth Circuit reported at 97 F.3d 118 (6th Cir. 1996)(Respondents App. A). An initial decision of the Administrative Law Judge dated August 26, 1992 concerning the same parties on the same underlying facts with the exception of attorney fees was appealed to the Court of Appeals for the Sixth Circuit and was affirmed in part, vacated in part and remanded for further proceedings and is reported at 3 F.3d 951 (6th Cir. 1993). (Petitioner's Appendix B)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1996. Staples and the Secretary of Housing and Urban Development filed petitions for rehearing and suggestion for rehearing en banc (Petitioners' Appendix G). The Petition and Suggestion for Rehearing en Banc were denied on January 24, 1997 (Petitioners' Appendix E).

The Petitioner alleges the Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Fair Housing Act as amended, 1988, 42 U.S.C. §§3601-19 and 24 CFR 103.1 through and including 24 CFR 104.590. Selected portions of 42 U.S.C. are reproduced and included in Respondents' App. E. Selected portions of 24 CFR are reproduced and included in Respondents' App. F.

STATEMENT OF THE CASE

Respondents Michael P. Kelly and John T. Kelly respectfully oppose Staples' petition for a writ of certiorari. The petition is an exercise in creative writing that is short on facts and long on emotion. Respondents are compelled to set forth the facts as Petitioner's is inaccurate.

FACTS:

The Petitioner allegedly made a phone call on March 5, 1990, to inquire about the availability of an apartment. Petitioner never viewed the apartment or went to the apartment and does not know with whom she spoke. Petitioner's sole observation of the apartment was from a bus window. Petitioner perceived that she was denied the apartment after a short phone conversation. Petitioner sought the assistance of Housing Opportunities Made Equal, Inc. (HOME), a local fair housing agency. The individual from HOME limited her investigation to asking Petitioner with whom she spoke. Based on the foregoing, HOME filed a complaint on behalf of Staples with HUD on May 19, 1990, that was filled with incorrect information.

HUD received the Staples complaint and sent it to an investigator, Charles Jung, who is assigned to HUD's Cincinnati office. This administrative assignment compounded HOME's error ridden complaint and commenced a series of violations by HUD of its own regulations, the Fair Housing Act, the criminal code and due process rights of Michael P. Kelly and John T. Kelly.[1] The full extent of HUD's noncompliance with the Fair Housing Act and the

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[1] James Wm. Kelly who was initially named as a discriminator in the second amended complaint filed November 1990 was never served with a complaint or contacted by Jung and was dismissed by the Administrative Law Judge as a party.

incompetence of HUD in dealing with Michael P. Kelly and John T. Kelly undermined every procedural safeguard in the Fair Housing Act, Congressional intent in the administration of the Fair Housing Act and deprived HUD of jurisdiction of the complaint.

HUD AND INVESTIGATOR JUNG:

A. **Service of Complaints**

HUD served Respondent Michael P. Kelly with the initial complaint at Michael P. Kelly Realty but never served the amended complaint or second amended complaint on him. John T. Kelly was never served with the initial complaint, amended complaint or the second amended complaint in compliance with the Fair Housing Act or HUD regulations. The second amended complaint was never served on James Wm. Kelly, who was alleged to be a discriminator, but he was subsequently dismissed as a party. In fact, the second amended complaint naming James Wm. Kelly as a discriminator was filed one month after Jung completed his investigation in this matter.

Jung never contacted Respondent Michael P. Kelly by phone or in person during the course of his investigation. Respondent Michael P. Kelly contacted Jung once concerning the complaint. While allegedly investigating the Staples' complaint, Jung arranged conciliation where Jung served as investigator and conciliator in violation of HUD regulations. Respondent Michael P. Kelly, Dionne Staples and representatives from HOME attended the conciliation. Respondent John T. Kelly attended the conciliation session with his brother Michael, but John T. Kelly was not aware that he was named as a discriminator at the time of the meeting and never received notice that he was named in a

complaint until August 1990.[2]

At the conclusion of the July 1990 conciliation meeting, Jung took the information provided in conciliation, that Jung never verified, and filed an amended complaint against Michael P. Kelly and John T. Kelly. Jung's use of information obtained in conciliation to file an amended complaint is in violation of HUD regulations and the Fair Housing Act. The notice of the filing of the amended complaint served by Jung on John T. Kelly did not meet the minimal requirements required by the Fair Housing Act concerning conciliation and the rights of the purported discriminator. Jung never served Michael P. Kelly with the first amended complaint.

When John T. Kelly received the amended complaint approximately two weeks after conciliation, he decided Jung was either incompetent or dishonest or both. John T. Kelly's impression of Jung proved accurate. John T. Kelly sent a response to HUD's Chicago Regional Office bypassing Jung. Jung failed to investigate any of the Staples' complaints in compliance with the Fair Housing Act, and under the guise of conciliation, used the information obtained in conciliation against the Kellys. It was obvious Jung could not be trusted, and the level of his incompetence is demonstrated in his trial testimony and observations of the Administrative Law Judge.

Jung never attempted to determine if service was made on Michael P. Kelly or John T. Kelly in compliance with the Fair Housing Act or HUD regulations even though he was the assigned investigator, because he alleged at trial it was not his job. Jung never spoke to any of HOME's testers during the

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[2] John T. Kelly was a co-owner of the apartment building in question and attended the conciliation at Michael P. Kelly's request. Petitioner makes reference to conciliation attempts by Jung (Petitioner's Appendix H 137-140), but John T. Kelly was not even served or notified of the complaint against him or his right to conciliation until August 1990.

course of his investigation. Jung spent a total of 20-25 minutes with Staples concerning her original complaint and two amended complaints which he testified at trial to being his normal investigative technique. Jung uses the local building or health code to determine a violation of the Fair Housing Act concerning familial status discrimination, but he does not have a complete copy of the local Cincinnati Basic Building Code relevant to the subject property. Jung has no idea of the responsibilities of property owners and believes the owner could be issued a condemnation order if the Building Code is violated, however he doesn't know what a condemnation order is.

Staples doesn't know with whom she spoke on March 5, 1990, and Jung never bothered to find out. Both HOME and Jung testified that it is important to determine who the complainant spoke to on March 5, 1990, but neither HOME nor Jung attempted to determine the identify of the individual. None of the witnesses could identify Michael P. Kelly or John T. Kelly as the individual who refused to rent, deal or negotiate for the rental of 6300 Montgomery Road.

The Kellys responded to Jung's request for information in September 1990, but they could not deal with him, because, due to his actions after conciliation, they believed him to be incompetent and deceitful. Jung completed his investigation on October 2, 1990. Jung didn't tell the Kellys the investigation was completed and, in fact, did not contact the Kellys after September 1990. The Kellys never received any correspondence concerning Staples' complaint after September 1990 from HUD or anyone else until March 1992. Staples wasn't contacted by HUD from October 2, 1990 until March 1992.

THE REASONABLE CAUSE DETERMINATION:[3]

HUD served the reasonable cause determination on Michael P. Kelley and James Wm. Kelly at 2147 St. James Place, Cincinnati, Ohio.[4] After two years, HUD still couldn't serve documents in compliance with the Fair Housing Act or even spell the parties' names correctly. Subsequent attempts at service eventually reached Michael P. Kelly and John T. Kelly. Answers were filed on behalf of Michael P. Kelly (Respondents' App. G) and John T. Kelly (Respondents' App. G). Respondents Michael P. Kelly and John T. Kelly conducted discovery and filed Motions to Dismiss (Respondents' App. H). The Motions to dismiss were overruled. (Respondents' App. H)

Respondents attempted to subpoena Jung's superiors to testify concerning Jung's actions and HUD's compliance with its regulations and the Fair Housing Act. The agency's Administrative Law Judge quashed the request for subpoenas and spared Jung's superiors from cross-examination.

THE TRIAL:

The trial was remarkable as not one witness could identify Michael P. Kelly or John T. Kelly as the individual who spoke to Staples. Jung was exposed as an incompetent who repeatedly violated the Fair Housing Act and HUD regulations at the expense of Respondents' rights. HUD trial counsel was exposed for answering and signing

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[3] Neither the Kellys nor Staples were represented by counsel prior to the issuance of the reasonable cause determination. Morgan served as general counsel for HOME during all or a portion of these proceedings.

[4] Ironically, although Michael, John and James Kelly are brothers, HUD added an extra "e" to Michael and John's last name while spelling James' last name with one "e."

interrogatories under oath that Jung purportedly answered but in fact never saw until trial. Against this backdrop of HUD duplicity and incompetence, the Administrative Law Judge held that the liability finding in this case was not based on Jung's credibility. Even the Administrative Law Judge found Jung, his investigation and HUD's handling of the complaints completely unreliable and incredulous.

The Kellys presented testimony that they rented to families with two children before the Fair Housing Act was enacted and after it was amended in 1988. The Kellys testified that they attempted to comply with the local occupancy code. The code enforcement official and the Director of Buildings and Inspections of Cincinnati both testified that occupancy laws are enforced. Nonetheless, the Administrative Law Judge ruled in favor of Staples and ordered a damage award and a plethora of enforcement mechanisms for which there is no justification in the record.[5]

THE FIRST APPEAL:

The Kellys appealed and Staples cross appealed, and the case proceeded to the Sixth Circuit. The Kellys believed the decision of the Administrative Law Judge was erroneous and Staples wanted more money. As Judge Lively stated at oral argument, the Sixth Circuit had to bail HUD out again. The Kellys' due process rights were dashed at the expense of protecting HUD. The Sixth Circuit vacated the damage award with the instruction that damages shall not be assessed during the period the case was completely neglected by HUD. The case was remanded with instructions not to award damages for the period of time HUD completely neglected the case and that the parties should attempt conciliation with a

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[5] Petitioner's brief makes a reference to race discrimination, however, Ms. Staples testified that both Jung and HOME informed her there was no basis for the race complaint.

competent, unbiased conciliator.[6]

INITIAL DECISION ON REMAND:

The remand of the case to the same Administrative Law Judge was an exercise in futility based upon the issuance of the Administrative Law Judge's order (Respondents' App. D). It was soon apparent that any submission to the Administrative Law Judge was strictly a formality, because the Administrative Law Judge's order in response to the Sixth Circuit's decision forecast exactly what the Administrative Law Judge's decision would be on remand. After finding that Jung lacked credibility, that HUD counsel had filed false interrogatories under oath and that HUD was indifferent to the Fair Housing Act, the Administrative Law Judge found that there was no period of complete neglect. Essentially the Administrative Law Judge found that even though the case was built on quicksand, HUD dispatched its duties, and the award was reduced by One Dollar, required payment of interest and extended reporting requirements. The decision amounted little more than vendetta justice.

THE ATTORNEY FEES:

Upon receipt of the initial decision on remand, Staples' counsel filed a petition for fees. The Kellys' counsel also filed a petition for fees. The Administrative Law Judge awarded fees to Staples' counsel in the sum of Thirty Thousand Six Hundred Fifty-two and 46/100 Dollars ($30,652.46)(Respondent's App. A). The Kellys' fee petition

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[6] Conciliation after the decision on the first appeal to the Sixth Circuit was an exercise in futility, as the demands were exorbitant, and the HUD conciliators were ineffectual five years after the date conciliation should have occurred.

was denied.[7] Neither Staples' counsel nor Kellys' counsel was involved in this case until after the Probable Cause Determination was issued in March 1992 or twenty-one months after the case was required to be concluded. The appearance of counsel was after the twelve-month period in the Court's decision in Kelly II.

THE SECOND APPEAL:

On appeal, the Sixth Circuit reduced Staples' damage award rather than finding that HUD completely neglected the case from Day One and lacked jurisdiction. Rather than address the due process violations and HUD's complete neglect and enforce the law as written, the Court gave Staples a compensatory damage award, an award of attorney fees almost seven times what Staples received and awarded the Kellys $20,000.00 in fees and expenses for the pursuit of their appeal rights before an agency that would not comply with its own regulations and rules; that persistently and repeatedly attempted to circumvent justice; that adamantly displayed a cavalier attitude toward the due process rights of the Kellys; that, with feckless abandon, attempted to exacerbate damages and alienate the parties; and that, even in the world of bureaucratic red tape, elevated the definition of "complete neglect" to a new high. HUD was an agency run amok.[8]

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[7] Although Judge Ryan stated in his dissent that the Kellys did not file a fee petition, it was included in the joint appendix and in the record filed with the Sixth Circuit.

[8] Kellys offered payment to Staples and notified Morgan that arrangements were being made to pay his fees. Morgan never responded to the Kellys' offer of payment. Delay in payment does not lie with the Kellys but with the nonresponse by Petitioner's counsel to assert an emotional appeal that everyone is paid except Staples and Morgan.

REASONS FOR DENYING THE WRIT:

A. The Petitioner's Appeal is Time Barred.

The Petitioner through its petition seeks to have this Court review a decision from August 27, 1993. Kelly v. HUD, 3 F.3d 951 (6th Cir. 1993) (Kelly I) The initial decision of the Sixth Circuit in Kelly I made it abundantly clear that the Petitioner's damage award would not stand and that HUD violated the Fair Housing Act. Id. at 954. The Sixth Circuit, once again, was required to bail out HUD. It is abundantly clear that the calculation of the Petitioner's damages would not accrue during any period that HUD completely neglected the case. Id. at 958. In the event that Petitioner wanted to challenge the complete neglect standard imposed in Kelly I, the Petitioner should have appealed. Obviously HUD and Staples had no problems with the "complete neglect" standard in Kelly I, as they did not appeal the decision in Kelly I.

The original panel in Kelly I adopted a "completely neglected" standard for the accrual of damages when HUD failed so miserably to comply with the Fair Housing Act. The panel majority in Kelly v. HUD, 97 F.3d 118 (6th Cir. 1996) (Kelly II), limited damages to a twelve-month accrual period under the facts of this case while the dissenting member ignored the facts and did not review the record in

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Further, Petitioner alleges this case languished in the Sixth Circuit when in fact the Court had three appeals before it: (1) Kellys' appeal, (2) Petitioner's appeal of One Dollar reduction in damages, and (3) The issue of attorney fees. All appeals were consolidated in one decision. Petitoner's counsel also failed to mention his request to extend time to file Petitioner's brief.

this matter or the appendices filed.[9] The panel majority in Kelly II enforced the decision in Kelly I. The time for Petitioner to appeal, if she did not accept the completely neglected standard, was at the conclusion of Kelly I.

B. Decision in Kelly II Does Not Conflict with N.L.R.B. v. Rutter Rex or Curtis v. Loether.

The Petitioner has repeatedly asserted the argument that not only Kelly II but also Kelly I are violative of or in conflict with N.L.R.B. v. J. H. Rutter Rex Manufacturing Co., 396 U.S. 258 (1969). The simple answer is that Rutter Rex involved an administrative complaint and subsequent charge that was: (a) timely filed; (b) served on the correct parties; (c) served in compliance with law; (d) promptly investigated; and (e) brought to trial in a timely manner and adjudicated. This case involves an administrative complaint that was filed on behalf of Staples by HOME. Staples chose HOME as her representative. The complaint prepared by HOME contained incorrect information. A time lapse of twenty-two months occurred between the complaint and the probable cause charge. More than nineteen months elapsed from the time HUD was required to act until it did act. HUD simply let the time lapse for the issuance of a charge against the Kellys. It is a jurisdictional limitation.

In Rutter Rex, the parties were aware that an adjudication order was issued within the time limits and liability attached. The issue in Rutter Rex became a collection issue based on a timely filed complaint after a

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[9] Judge Ryan explains in detail that the Kellys didn't file an application for fees. The fee application was included in the joint appdendix filed in the Sixth Circuit and was apparently overlooked by Judge Ryan, his clerk or both.

hearing was held and a determination was reached. In this proceeding, HUD permitted the time to lapse within which it had jurisdiction to issue a Probable Cause Determination and to make a liability determination. HUD's actions in this case were time barred, unlike Rutter Rex.

N.L.R.B. v. Ironworkers, 466 U.S. 720 (1984) cited by Petitioner, is factually similar to Rutter Rex and not to this case. Much the same as Rutter Rex, the claims in Ironworkers were not time-barred. The claims were timely asserted and adjudicated. There was no assertion of incompetence, corruption, violation of agency regulations, an Act of Congress or a time-barred action by an Administrative Law Judge in Rutter Rex or Ironworkers. Both cases are enforcement actions of a judgment timely and lawfully obtained. In this case, the Court is dealing with an agency that lost jurisdiction to adjudicate the matter through sheer indifference or knowing violation of its regulations and the Fair Housing Act.

Curtis v. Loether, 415 U.S. 189 (1974) is also inappropriate to this proceeding. Once again a court must have jurisdiction to hear the case. If the case is barred by the terms of the statute, it must be dismissed. Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989). The language of the Fair Housing Act is clear concerning HUD's obligations regarding investigation and notice. Even HUD's own regulations specify time limits. 24 CFR 103.45.

Rather than focus on Judge Ryan's emotional dissent, the Kellys choose to focus on the law. The majority of the panel saw an agency that failed to comply with an Act of Congress and fashioned what it perceived to be an equitable result. Judge Ryan adopted a mindset of indifference to the law in order to achieve an emotional result that only encourages judicial activism rather than adherence to the law. Agency action contrary to law was the edifying exercise before the Sixth Circuit that, although lost on Judge Ryan,

was perceptively examined by the other five judges who reviewed this matter on two separate occasions and accurately assessed HUD's failure to comply with the law.

C. No Conflict with Decisions in Other Courts

Congress and this Court never countenanced that damages would be awarded on time-barred complaints. The principle is that strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law. Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) and Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984).

D. Decision Below Does Not Conflict with Intent of Congress

The faster and more practical remedies envisioned by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, codified at 42 U.S.C. Section 3601, et seq. are not present in this case. The reason they are not present is the failure of HUD to act.

The faster and more practical remedies envisioned and mandated by Congress were an investigation and issuance of a probable cause determination within 100 days. 42 U.S.C. 3610 (B)(iv). If the Secretary is unable to complete the investigation within 100 days, the Secretary must notify the parties in writing of the reasons for not completing the investigation. 42 U.S.C. 3610(c). Even HUD's self-serving affidavit (Petitioner's App. H 145-146) demonstrates that HUD failed to comply with the Fair Housing Act. The law requires a reason why the investigation could not be completed and not a generic computer notice that was never sent to the Kellys. The notices required by law, and purportedly sent, were sent to the wrong address as evidenced

by the record, and the HUD representative's own affidavit, which directly conflicts with the stipulation of HUD trial counsel at trial, states that the notice to extend was never served on John T. Kelly [Petitioner's App. H 146(2)]. If one reads the affidavit concerning who was served, the duplicity of HUD is clear.

HUD had no authority to issue a probable cause determination after it failed to comply with the law to preserve its jurisdiction. The purported jurisdiction of the Administrative Law Judge was illusory. When it enacted the Fair Housing Act, Congress mandated clear, specific deadlines and prompt processing of complaints. It is not this Court's place, much less an Administrative Law Judge's, to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction. Mohasco at 825, 826.

E. The Court of Appeals' Decision Conforms with the Law.

The decisions below do not demonstrate animosity between the Sixth Circuit and HUD, but rather the reluctance of a Court to condone agency inaction that violates the law and its refusal to serve as a rubber stamp. The agency Administrative Law Judge provided the rubber stamp on three occasions. A review of the record and, in particular, Jung's testimony, spotlights the lawlessness and incompetency of HUD. The fact that Jung has saddled the Sixth Circuit with two separate cases concerning his conduct during the investigation of housing complaints is noteworthy.[10] Quite

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[10] Jung also was the investigator assigned in Baumgardner v. HUD, 960 F.2d 572 (6th Cir. 1992). In that proceeding, Jung procrastinated concerning conciliation, his investigation and reasonable

possibly the majority, unlike the Administrative Law Judge, believes that Congress envisioned that the rights of all parties should receive protection. The "unedifying exercise in unrestrained judicial power" in this case was at the Administrative Law Judge level when he failed to enforce the law as written against an agency that employs him. The majority fashioned a remedy for the Petitioner when there should be none, and the dissent engaged in semantics to shield HUD regardless of its conduct.

F. **No High Importance.**

If HUD follows the law, there is no damage issue or two-tiered system. What is unjust in the extreme is to subject citizens to the whim and caprice of a government agency whose conduct violates the law. What is unjust in the extreme is the carte blanche attitude extended to HUD and every other governmental agency by a dissenting opinion that winks at gross misconduct by the government. What protects the parties to these types of proceedings is the panel majority that makes all parties follow the law without special dispensation.

The quest for simple justice in this case has cost the Kellys in excess of $100,000.00 as a result of HUD's violations. Far from an unedifying exercise for the Kellys, they have viewed, first-hand, unrestrained government power. The frustration is not with Staples but with an agency that has a mindset of vendetta justice. HUD has a demonstrated history of failing to comply with the law, and to grant certiorari will only reinforce its lawless conduct.

This case underscores that a federal agency must comply with the law as written. An agency cannot rely on its

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cause determination.

agency's Administrative Law Judge to provide cover so it can do as it pleases regardless of the law. When agency action is viewed by an impartial and disinterested judicial panel, the agency's violation of the law is rightfully called into question. The Sixth Circuit expects HUD to comply with the law and turn square corners. The Administrative Law Judge, on the other hand, provides cover for a dawdling group of buffoons at HUD by attempting to shield an incompetent HUD investigator, his superiors and the procedures utilized by HUD from the Sixth Circuit's wrath. The Administrative Law Judge gutted the jurisdictional and due process requirements of the Fair Housing Act guaranteed to the Kellys for the sake of nailing them. It appears that the mindset at HUD is that it should not be challenged. HUD perceives itself as above the law and, quite frankly, who will take on a rogue government agency when the cost is so extreme? Rights of citizens are vanquished because the cost of battling such an amoral and illegal operation is usually prohibitive.

HUD obviously does not perceive this case as a matter of great importance, or it would be petitioning the Court for a writ of certiorari. However, HUD may attempt to come in at the last minute with fraudulent affidavits, notices sent to the wrong court, and notices sent to different respondents in the hope of obtaining a dispensation from this Court's rules. It worked at the Administrative Law Judge's level, and HUD has demonstrated that if it is given an inch, it will take a mile.

CONCLUSION

Petitioner has presented this Court with no cognizable reason to review the Sixth Circuit's decision. Nothing in the Sixth Circuit's decision is in conflict with any case cited by Petitioner. For these reasons, the Petitioner's Writ for Certiorari should be denied.

/S/ _____
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Attorney for Respondents

APPENDIX A

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,

Charging Party,

v.

Michael P. Kelly and John T. Kelly

Respondents.

HUDALJ
05-90-0879-1
Decided:
September 21, 1995

Robert G. Kelly, Esquire
For the Respondents

Frederick M. Morgan, Jr., Esquire
For the intervenor

Kathleen M. Pennington, Esquire
For Charging Party

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION AND ORDER ON APPLICATIONS FOR ATTORNEY'S FEES

Background

On August 26, 1992, I issued a decision in this case concluding that Respondents violated sections 804(a),(b), and (c) of the Fair Housing Act as amended (42 U.s.C. §§3604(a), (b), and (c))("the Act"). The decision included an award of damages to Complainant-Intervenor Dionne Staples and an injunction. HUD v. Kelly, 2 Fair Hous.-Fair Lend. (P-H)P. 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992). Respondents appealed the decision to the United States Court of Appeals for the Sixth Circuit, which affirmed the liability findings and the injunction but vacated the damages award to Complainant-Intervenor so that HUD could again attempt to conciliate the damages issue. Kelly v. HUD, 3 F.3d 951 (6th Cir. 1993). After HUD's conciliation efforts failed for the second time, I reconsidered the damages award pursuant to the Circuit Court's order, an on December 1, 1994, issued an Initial Decision on Remand that reduced the original award of damages by $1 to $10,429.76 plus interest. Respondents appealed that decision in a petition that is currently pending before the Circuit Court.

Complainant-Intervenor has filed an application for an interim award of her attorney's fees and expenses in the amount of $35,362.46 to cover litigation costs from May 6, 1992, through January 12, 1995. Respondents oppose the

application and request an award of attorney's fees and costs in their own behalf in the amount of $46,432.69 for their legal expenses from March 11, 1992, through January 23, 1995.

Discussion

Section 812(p) of the Act provides that a prevailing party (other than HUD) in an administrative proceeding under the Act may recover attorney's fees and costs. (42 U.S.C. §3612(p)) Section 104.940(b) of the regulations also provide that

> To the extent that a intervenor is a prevailing party, the respondent will be liable for reasonable attorney's fees unless special circumstances make the recovery of such fees and costs unjust.

A prevailing party is any party that succeeds on any significant issue in litigation that achieves some of the benefit the party sought in bringing suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). See also Busche v. Burkee, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981); Dixon v. City of Chicago, 948 F. 2d 355, 357-58 (7th Cir. 1991). A plaintiff has prevailed when she has "established the legal liability of the opposing party...." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). Inasmuch as Respondents were found to have violated the Act as charged by Complainant-Intervenor and were ordered to pay damages to Complainant-Intervenor, Complainant-Intervenor is a prevailing party. Respondents, on the other hand, are not prevailing parties because they have not succeeded in obtaining the only thing they have sought in this litigation-dismissal of the case. Furthermore, to receive attorney's fees under the Equal

Access to Justice Act, Respondents would also have to demonstrate that the position of the Charging Party was not "substantially justified," an impossible task inasmuch as the Charging Party prevailed in the case.[1]

[1] Subsection 2412(d) of the Equal Access to Justice Act (28 U.S.C. §2412 provides in pertinent part:

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses in addition to any costs awarded pursuant to subsection (a) incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review or agency action, brought by or against the United in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

An Interim Award Is Appropriate

Although the Circuit Court has yet to rule finally on some of the issues presented by this case, an interim award of attorney's fees is nevertheless appropriate. In Hanrahan v. Hampton, the Supreme Court held that a plaintiff is entitled to an interim attorney's fee award upon demonstrating "entitlement to some relief on the merits of [her] claims," 446 U.S. at 758. See also Texas State Teachers Ass'n. v. Garland Independent School District, 489 U.S. 782, 791-92 (1989); Brunet v. City of Columbus, 642 F. Supp. 1214, 1254 (S.D. Ohio 1986)(interim fees awarded in Title VII case based upon favorable liability ruling and interlocutory injunctions); Kind v. Palmer 641 F. Supp. 186, 189-90 (D.D.C. 1986)(interim fee award based upon favorable liability ruling in Title VII case). The Sixth Circuit Court has affirmed Respondents' legal liability as well as Ms. Staples' entitlement to damages. She is therefore entitled to her attorney's fees, if reasonable.

An interim fee award may be made immediately payable to alleviate economic hardship to plaintiff's counsel. See, e.g., Carpenter v. Stephen F. Austin State University, 706 F.2d 608, 633 (5th Cir. 1983)(affirming award of interim fees "in order to prevent extreme cash-flow problems of the plaintiffs and attorneys"); Ramos v. Lamm, 632 F. Supp. 376, 389 n. 10 (D. Colo. 1986)(awarding interim fees in case that lasted several years); Palmer v. City of Chicago, 596 F. Supp. 1060, 1062 (N.D. Ill. 1984)(awarding interim fees where counsel "have spent hundreds of hours on the case without pay"), rev'd on other grounds, 806 F.2d 1316 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987); Smiddy v. Varney, 574 F. Supp. 710, 714 (C.D. Cal. 1983)(immediate payment of interim fees ordered to avoid "substantial hardship" to attorneys who had worked on case for six years).

In the instant case, Mr. Morgan, counsel for Complainant-Intervenor, has devoted more than 200 hours to this case since May 1992 without receiving payment of any fees or expenses. He has been sole practitioner since March 1993, and a large part of his practice consists of contingent-fee, civil rights litigation. This case represents a substantial fraction of his uncompensated work. Application, Exhibit 1. These circumstances support issuance of an interim award of attorney's fees.

Summary of Respondents' Complaints

The Supreme Court in Hensley stated that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. Respondents have not contested the claim by Complainant-Intervenor's counsel that his current billing rate of $150 per hour is reasonable. Rather, they complain that special circumstances require denial of the application for fees and costs file by Complainant-Intervenor; that with regard to the first phase of litigation, counsel "wants 20% interest on a fee application that he submitted on behalf of a law firm with which he is no longer associated"; that counsel engaged in noncompensable activities on behalf of his client; and finally, that even when engaged in compensable activities he often took too much time to accomplish the tasks. Respondents' brief, p. 8.

"Special Circumstances" Do Not Exist

"[T]he Supreme Court has held that although it is within the district court's discretion to award attorney's fees under [civil-rights fee-shifting statutes], `in the absence of special circumstances a district court not merely `may' but

must award fees to the prevailing plaintiff...." ' Morscott v. City of Cleveland, 936 F.2d 271, 272 (6th cir. 1991), quoting Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989) (emphasis in original). The Supreme Court has also held that a "court's discretion to deny a fee award to a prevailing plaintiff is narrow." New York Gaslight Club v. Carey, 447 U.S. 54, 68 (1980). Moreover, a defendant who claims "special circumstances" has the burden to demonstrate them, "and the defendant's showing must be a strong one." Herrington v. County of Sonoma, 883 F.2d 739, 744 (9th Cir. 1989), citing J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir. 1985). Respondents have failed to meet that burden.

The only "special" circumstances Respondents cite are the conclusions by the Sixth Circuit Court of Appeals that the Secretary impermissibly delayed processing Ms. Staples' complaint and did not provide Respondents with objectively reasonable conciliation before issuing the Charge of Discrimination. The Secretary was responsible for those procedural errors, not Ms. Staples or her counsel. Respondents cite no authority and none has been found for the proposition that respondents found guilty of housing discrimination should be relieved of their duty to pay attorney's fees to a prevailing complainant-intervenor because the Secretary committed procedural error while processing the case. In short, there is no support in fact or law for Respondents' argument that "special circumstances" require denial of Complainant-Intervenor's application for an award of attorney's fees and costs.

Furthermore, no statute, regulation, or case supports Respondents' suggestion that the Secretary rather than Respondents should pay Ms. Staples' attorney's fees. The only case cited by Respondents to support their suggestion,

Huderson v. U.S. Dept. of Housing and Urban Development, 737 F. Supp. 20 (E.D.Pa. 1989), is inapposite. Unlike the instant case, the Department did not prevail in Huderson and was required under the Equal Access to Justice Act to pay attorney's fees to the plaintiff who did.

Details of Respondents' Complaints

During the first phase of the instant litigation, counsel for Complainant-Intervenor charged $120 per hour in civil rights cases. He now requests an attorney's fee award at the rate of $150 per hour for all of his time spent on the case up to January 1995. Respondents object. In Missouri v. Jenkins, 491 U.S. 274 (1989), the Supreme Court held that a fee award should fully compensate a prevailing plaintiff's counsel through "an appropriate adjustment for delay in payment--whether by the application of current rather than historic hourly rates or otherwise[.]" Id. at 284. The Court in Jenkins affirmed an award reflecting counsel's current $275-per -hour rate for all of the time expended on the case over 15 years. The principle announced in Jenkins has been reaffirmed in recent cases in the Southern District of Ohio. In White v. Morris, 863 F. Supp. 604, 611 (S.D. Ohio 1994), the Court held that "district courts should award reasonable attorney's fees according to the current market rates in the relevant community." See also James v. Runyon, 868 F. Supp. 911 (S.D. Ohio 1994). Because the case law supports an award based on current rather than historical rates, there is not merit to Respondents' complaint regarding the hourly rate of compensation for the first phase of this litigation.

Respondents also complain that counsel seeks compensation for time spent on activities that do not appear to have directly benefited his client, such as time spent

addressing the issue of witness fees for witness who did not appear at trial, and time spent preparing a notice of appeal that was later withdrawn. These complaints have no merit. During the ordinary course of litigation, attorneys almost always find that they have chosen a line of inquiry or a course of action that must be abandoned. As long as the choice was reasonable at the outset and success is finally achieved, the attorney cannot be faulted simply because a particular activity later proves a "dead end." The mere fact that time was spent in this case on an appeal that was later withdrawn or in dealing with potential witnesses who did not appear at trial does not prove that it was unreasonable for counsel to have pursued those activities at the outset.

Respondents also complain that counsel spent time consulting with Ms. Staples' previous counsel, the Government's investigator, the Secretary's counsel, and non-parties. These complaints are also meritless.

Substitution counsel necessarily will have to spend time with previous counsel, or the client, or both, to become familiar with the history of the litigation. Respondents have not demonstrated that the amount of time Mr. Morgan spent consulting with Ms. Staples' previous counsel was unreasonable under the circumstances.

Respondents fall wide of the mark with their complaint that Mr. Morgan and the Secretary's counsel jointly prepared their witnesses for trial. In many respects the interests of the two parties were identical, and it was necessary and proper for counsel to prepare witnesses jointly in order to preclude unnecessary duplication at trial. Counsel for Complainant-Intervenor did not unnecessarily duplicate the work of counsel for the Secretary in this case.

It was appropriate for Complainant-Intervenor's counsel to consult with the Government's investigator who testified in this case, just as it is appropriate for counsel to consult with any witness in any case. This is particularly true when, as here, the conduct of the witness had become the subject of appellate litigation.

The non-parties about whom Respondents complain apparently were either amici or potential amici in the appellate litigation. Such consultations are common to appellate litigation, and nothing in the record shows that Mr. Morgan amici consultations were untoward in any respect.

On May 18, 1994, after analyzing the original decision and damages award, counsel for Complainant-Intervenor sent a letter to the Secretary's counsel containing a settlement demand. Mr. Morgan requests compensation for 3.10 hours expended on these activities. According to Respondents, it should not have taken 3.10 hours to accomplish these tasks. Although some attorneys may have been able to complete these tasks in less time, nothing in the record shows that Mr. Morgan's request is outside the range of the reasonable. The same can be said for Respondents' complaint that it should not have taken 13.70 hours to respond to this court's August 1994 briefing order.

Respondents argue that Mr. Morgan is guilty of padding his bill. To support their argument they cite several minor charges, such as a .50 hour charge concerning a conference call on July 13, 1992, an alleged duplication of charges on September 25 and 26, 1993, and telephone calls in February 1994 to people at HUD and the Department of Justice regarding conciliation and a mediation plan.

Respondents mischaracterize the July 13, 1992, charge

as "a charge of .50 hours for a set up of call to the Court." (Brief, p. 7) Mr. Morgan's invoice of october 23, 1992 shows that the .50 hour charge includes the time spent to the conference call itself. it is not a charge for doing nothing.

Mr. Morgan's invoice shows that a September 25, 1993, he spent .30 hours to "R&R BKelly's petition for rehearing." These two entries simply show that counsel spent a total of 1.4 hours to accomplish a single task, not that he charged his client twice for the same work.

Similarly meritless are Respondents' protests that counsel cannot charge for telephone calls regarding conciliation and mediation in february 1994 because HUD had made no conciliation efforts and Respondents were not notified of any mediation plan in February 1994. Mr. Morgan explains that the purpose of his telephone calls was to determine when mediation efforts would begin and to try to move the case along. Reply brief. p. 12.

Respondents also protest Mr. Morgan's request to be compensated for time spent preparing a request for rehearing filed in the circuit Court of Appeals, preparing fee applications, and helping Ms. Staples secure a loan. Unlike their other complaints, these protests are well-founded.

Between August 28, 1993, and October 2, 1993, Mr. Morgan spent 27.8 hours on this case, of which 14.6 hours were devoted to preparing and filing a petition for rehearing and suggestion for rehearing en banc. The petition appears to have been rejected by the Circuit Court because it was untimely filed. In the absence of an explanation and justification for this apparent violation of court rules, compensation for time spent preparing and filing the petition must be denied. The remainder of the time claimed for this

period is compensable because it was spent consulting with amici and counsel for the parties, responding to Respondents' litigation initiatives, and researching issues that arose later in the litigation.

Counsel's request to be compensated for 22.4 hours sent preparing fee applications (nearly 10 percent of the total claim) is excessive on its face. Much of that time was unnecessarily spent preparing legal arguments with which Respondents have had no quarrel. An application for fees need include no more than a summary of the black-letter law, along with an affidavit an itemized invoices. One full day (eight hours) should have sufficed to complete the appropriate level of research and prepare the applications and supporting documents, particularly for an attorney who is claiming expertise in housing discrimination litigation. The fee award will be reduced accordingly.

Securing a loan for a client is not within the normal duties of counsel in a housing discrimination case and is therefore not compensable.

Respondents argue that it was unreasonable for Complainant-Intervenor's counsel to spend 234 hours on this case. That argument is unpersuasive in light of the claim by Respondents' counsel that he had spent 377.25 hours on the case as of January 1995. After reducing Mr. Morgan's fee application for the reasons discussed above, Complainant-Intervenor will e compensated for fees covering 202.6 hours. In hourly terms, that amount constitutes approximately 54 percent of Respondents' claim. Assuming that the amount of time Respondents' counsel spent on the case was reasonable and justifiable, it necessarily follows that it was not unreasonable for Complainant-Intervenor's counsel, one of two attorneys opposing Respondents' counsel, to spend

approximately half that amount of time on the case.[2]

Conclusions

Complainant-Intervenor has prevailed in this case an is therefore entitled to an award of attorney's fees. Respondents have not prevailed an therefore are not entitled to an award of attorney's fees. Excepting the elements addressed above, Complainant-Intervenor's application for an interim award of attorney's fees and costs appears reasonable.[3] Although some issues raised in this case are currently before the Circuit Court of Appeals, an interim award of attorney's fees is appropriate under the circumstances.

ORDER

It is hereby ORDERED that:

1. Complainant-Intervenor's application for an award of interim attorney's fees and costs is granted;

2. Within 30 days of the date of this Order, Respondents shall pay Complainant-Intervenor a total of $30,652.46, consisting of attorney's fees covering 202.6 hours at $150 per hour, plus $262.46 for costs; and

3. Respondents' application for attorney's fees is denied.

THOMAS C. HEINZ
Administrative Law Judge

Dated: September 21, 1995.

[2]Besides filing briefs, counsel for Complainant-Intervenor conducted the principal direct examination of Ms. Staples (TR. 290-327) and the principal cross-examinations of Respondents (TR 487-565; 589-91; 635-52) and other witnesses. His work materially aided the court in resolving the issues presented by the case.

[3]Those arguments of the respondents not expressly addressed herein are argumentative, frivolous, or niggling, and are therefore meritless. In Kurowski v. Krajewski. 848 F.2d 767 (7th Cir. 1988), cert. denied, 488 U.S. 926 (1989), the court condemned complaints about charges for very short period of attorney time as "[n]iggling objections" that "simply increase the ultimate bill and waste judicial time." Id. at 777.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION FOR ATTORNEY FEES APPLICATION AND ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 21st day of September, 1995, in the manner indicated:

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APPENDIX B

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Dionne Staples,

Charging Party,

v.

HUDALJ 05-90-08789-1

Michael P. Kelly
John T. Kelly
James Kelly d/b/a
Michael P. Kelly, Realty

Respondents.

ORDER

Having considered Respondents' request for the issuance of subpoenas, and the positions of the parties during a telephone conference on May 18, 1992, I conclude that the

request should be granted in part.

To the extent that Respondents seek to subpoena each other, and to subpoena Thomas Higginbotham, and attorneys Konrad Rayford, Geoffrey Roupas, and Lewis Nixon, none of whom is a fact or expert witness with testimony expected to be relevant to the issues in this proceeding, the request for subpoenas is denied.

ALAN W. HEIFETZ
Chief Administrative Law Judge

Dated: May 19, 1992

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by ALAN W. HEIFETZ, Chief Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 19th day of May, 1992, in the manner indicated:

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APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Dionne Staples,

Charging Party,

v.

HUDALJ 05-90-0879-1

Michael P. Kelly, et. al.,

Respondents.

ORDER

On May 1, 1992, Respondents filed the following four motions:

1. Motion of Respondent Michael P. Kelly to Dismiss Determination of Reasonable Cause and Charge of Discrimination and Request for a Protective Order;

2. Motion of Respondent John T. Kelly to Dismiss Determination of Reasonable Cause and Charge of Discrimination and Request for a Protective Order;

3. Motion of Respondent Michael P. Kelly Realty for Protective Order; and

4. Motion of Respondent James Kelly to Dismiss Determination of Reasonable Cause and Charge of Discrimination and request for a Protective Order.

On May 13, 1992 the Government filed a prehearing statement stipulating that James Kelly is not a party to this case. Accordingly, an order will be issued removing James Kelly from the case, thereby rendering motion number 4. moot.

The Government opposes the motions. All will be denied. The first two are largely duplicative. They allege a variety of irregularities on the part of the Government (sometimes "the Secretary") during the period beginning with the filing of a housing discrimination complaint (hereinafter "the complaint") by Dionne Staples and ending with the service by the Secretary of the Determination of Reasonable Cause and Charge of Discrimination (hereinafter sometimes "the Charge") which initiated this proceeding. More specifically, Respondents pose five arguments to support their motion to dismiss:

Argument 1. The Secretary failed to serve notice of Dionne Staples' complaint on each of the Respondents by certified mail or personal service within ten days of filing, as required by 24 C.F.R. Sec. 103.50. This argument is without merit. The Government contends that copies of the complaint filed by Dionne Staples on May 17, 1990, were

sent on May 18, 1990, to Respondents Michael and John Kelly by certified mail. Copies of return receipt cards bearing the signatures of Michael P. Kelly and John Kelly have been submitted to show that Michael and John Kelly received copies of the complaints on May 24 and May 25, 1990, respectively. Michael P. Kelly was served at his place of business rather than his personal residence, but service may be effected at a respondent's place of business as well as his usual place of abode. See 24 C.F.R. Sec. 103.9. Respondents Michael and John Kelly accordingly received timely and proper service of the complaint filed by Dionne Staples on May 17, 1990, as required by 24 C.F.R. Sec. 103.50.

Argument 2. The Secretary failed to complete the investigation of the complaint within 100 days, and failed to notify Respondents of the reasons why the investigation could not be completed within 100 days, as required by 24 C.F.R. Sec. 103.225. The Secretary concedes that the allegations contained in this argument are true.

3. In an argument closely related to argument number 2., Respondents contend that the Secretary failed to make a reasonable cause determination within 100 days of the filing of the complaint as required by 24 C.F.R. Sec. 103.400, and failed to notify Respondents of the reason for the delay, as required by 24 C.F.R. Sec. 103.400(c)(2). However, Respondents have not demonstrated that the errors specified in arguments 2. and 3. require dismissal of the Charge. The United States Court of Appeals for the Sixth Circuit in *Baumgardner v. HUD*, No. 91-3039 (March 3, 1992) recently established a "substantial prejudice" test to be applied when the record shows "procedural shortcomings" on the part of the Government. Slip op. 9. The Sixth Circuit Court found errors in that case like those found in the instant

case. For example, in *Baumgardner* the Government failed to complete its investigation within 100 days and failed to give the petitioner notice of the reasons for delay. Although the Government committed several additional procedural errors in *Baumgardner* not found in the instant case, the *Baumgardner* Court held that the Government's errors were not sufficiently prejudicial to require dismissal of the Charge. In the instant case, the record does not demonstrate how Respondents have suffered any substantial prejudice as a result of the Government's failure to complete its investigation and issue the reasonable cause determination within 100 days and notify Respondents of the reasons for that failure. Hence, dismissal of the Charge cannot be justified.

When the same issue arose in *United States v. Scott, et. al.*, No. 90-1374-7 (D. Kans. March 25, 1992), the Court held that the secretary's failure to complete an investigation of a housing discrimination complaint and make a reasonable cause determination within the 100 days required by statute did not warrant a dismissal of the action. The Court noted that the 100-day requirement is not a *per se* limitation. Section 3610 of 42 U.S.C. and he parallel regulation section, 24 C.F.R. Sec. 103.400(c)(1), require the Secretary to conclude the investigation and make a reasonable cause determination within 100 days of the filing of the complaint, "unless it is impracticable to do so." Furthermore, the statute and the regulations do not specify the consequences of failing to meet the deadline. The *Scott* Court concluded that:

> because section 3610 of the Fair Housing Act contains the "impracticability" qualification and fails to specify the consequences of HUD's

> noncompliance, this court concludes that Congress did not intend the 100-day statutory deadline to operate as a jurisdictional prerequisite or a statute of limitations to justify dismissing this action.

I find the reasoning of the *Scott* Court persuasive. Dismissal is not warranted for the Government's procedural shortcomings in this case.

Argument 4. The Secretary failed to give Respondents notice of Dionne Staples' complaint and an opportunity to respond before issuing the Charge as required by 24 C.F.R. Sec. 103.405. This argument is meritless. The record demonstrates that Respondents Michael P. Kelly and John T. Kelly were given notice of Dionne Staples' complaint and an opportunity to respond before the Secretary issued the Charge. They, in fact, did respond to the complaint by sending answers in letter form to HUD on May 29, 1990, and August 7, 1990, respectively.

Argument 5. The Secretary failed to serve the reasonable cause determination in compliance with 24 C.F.R. Secs. 103.405 and 104.40. This argument is also without merit. The Determination of Reasonable Cause and Charge of Discrimination was sent to the Respondents by certified mail by the Secretary on March 2, 1992, and again on March 11, 1992, after amendment. Respondent Michael P. Kelly acknowledged receipt on March 13, 1992 and on March 23, 1992, as evidenced by return receipt cards in the record which bear his signature. The Determination of Reasonable Cause and Charge of Discrimination was mailed to John T. Kelly at the address appearing under his signature on his

August 7, 1990, response to the complaint, that is, 3027 Erie Ave., Cincinnati, Ohio. Someone named either "A." or "H." Kelly acknowledged receipt at that address on March 30, 1992. Respondent has not demonstrated that the person who acknowledged receipt was not of suitable age or discretion to receive this material on behalf of Respondent John T. Kelly. Section 104.40 of the regulations (24 C.F.R. Sec. 104.40) provides: "Service of documents upon any party may be made by personal service or by mailing a copy to the last known address." The record shows the Government has satisfied this requirement. In sum, Respondents' motions to dismiss have no merit.

In additional to seeking dismissal of this action, Respondents have moved for a protective order prohibiting the Secretary from pursuing certain of his discovery requests. During a telephone conference on May 15, 1992, between counsel for the parties and the undersigned, counsel revealed that most of the Government's discovery requests were honored subsequent to the filing of Respondents' requests for a protective order. Moreover, the Government has not indicated any desire to pursue discovery beyond that already acquired. Accordingly, Respondents' requests for a protective order have been mooted.

During the May 15, 1992, conference, the parties agreed that "Michael P. Kelly Realty" is not a separate legal entity.

It is hereby ORDERED:

1. James Kelly is not a party to this case and his name shall be removed from the case style; and

2. All of the motions filed by Respondents on May 1, 1992 are denied.

THOMAS C. HEINZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 21st day of May, 1992, in the manner indicated:

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APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Dionne Staples,

CORRECTED COPY

Charging Party,

HUDALJ 05-90-0879-1

v.

Michael P. Kelly and
John T. Kelly

Respondents.

ORDER

On August 26, 1992, I issued a decision concluding that Respondents violated §§804(a), (b), and (c) of the Fair Housing Act as amended (42 U.S.C. §§3604 (a), (b), and (c)). The decision awarded damages of $10,430.76 to

Complainant Dionne Staples but declined to impose any civil penalties. Respondents appealed the decision to the Sixth Circuit Court of Appeals, which issued its decision on August 27, 1993, in *Kelly, et al. v. Secretary, HUD*, 3 F.3d 951 (6th Cir. 1993). The Court of Appeals affirmed the liability findings of the decision below, vacated the damage award, and remanded the case to the Secretary:

> for the purpose of conducting conciliation with a qualified conciliator other than Charles Jung, who has had no previous contact with this case. If conciliation fails, the case will be returned to the ADMINISTRATIVE LAW JUDGE for reconsideration and such further proceedings as may be required in light of this opinion; but in no case should damages be assessed for the period during which HUD completely neglected this case.

3F.3d 957-58.

I have been informed by letter dated July 18, 1994, from the Secretary's Assistance General Counsel of the Midwest that the additional conciliation efforts required by the court have failed, leaving the parties at an impasse. The damage issue must therefore be reconsidered. To assist me in that task, the parties are hereby **ORDERED** to file on or before **September 20, 1994,** briefs addressing the following:

1. Excepting the opinion in *Kelly*, what authority, if any, exists for or against the proposition that the victim of a civil rights violation must suffer a reduction in proven compensatory damages if the Government committed procedural errors during the period preceding the issuance of the Government's complaint?

2. Identify, with citations to the record, the beginning and ending dates of the period(s) during which HUD "completely neglected" the case initiated by Complainant Staples;

3. Section 3610 of the Act requires that the Government complete the investigation of a complaint, attempt to conciliate the complaint, make a reasonable cause determination of the merits of the complaint, and, where warranted, issue the charge of discrimination within 100 days of the filing of the complaint, "unless it is impracticable to do so." Section 3612(g) of the Act requires the ADMINISTRATIVE LAW JUDGE to commence the hearing "no later than 120 days following the issuance of the charge, unless it is impracticable to do so." In the instant case, can the Sixth Circuit's *Kelly* decision be read to approve the accrual of damages during the period beginning with the discriminatory event and ending 220 days after the filing of the complaint, regardless of whether or not the Government "completely neglected" the case at any time during those 220 days? In other words, is the 220-day period immune from attack? If the accrual period for compensatory damages may properly extend beyond the 220-day limit, what determines the length of the extension? Did the court mean to say that it will approve a damage accrual period longer than 220 days only to the extent that the record shows that for each and every business day beyond the 220th day the Government was acting to advance the case? Do damages accrue for those days when the Government acted but not for those days when it did not? May days of Government inactivity be added to the accrual period? If so, how many and on what jurisdiction? What determines the closing date for an accrual period extending beyond the 220th day?

4. In *Baumgardner v. HUD ex rel Holley*, 960 F.2d

572 (6th Cir. 1992), approximately 17 months transpired from the filing of the complaint until the trial. Although the Sixth Circuit criticized HUD's "procrastinations" in that case, the court did not reduce the compensatory damage award based on HUD's delays in presenting the case for adjudication. (Instead, the court reduced the compensatory damage award based on evidentiary considerations.) Would 17 months be a reasonable accrual period for compensatory damages in the instant case inasmuch as the Sixth Circuit seems to have approved in *Baumgardner*?

5. In the *Baumgardner* case, the Sixth Circuit Court used the term "damages" to include civil penalties. See *Hud v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) Para. 25, 034, 25, 363 n.26 (HUD A.L.J. Aug. 26, 1992). Did the court mean to include civil penalties within the meaning of the word "damages" as quoted in the first paragraph of this Order? If so, does the *Kelly* opinion permit compensatory damages to be increased by HUD's delays if the increase if offset by a correspondingly reduced civil penalty?

6. The parties may address any other issues in their briefs that they consider relevant in light of the Sixth Circuit's opinion in *Kelly*.

/s/_____
THOMAS C. HEINZ
Administrative Law Judge

Dated: August 16, 1994

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 16th day of August, 1994, in the manner indicated:

/s/_____
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APPENDIX E

Sec. 802, 42 U.S.C. §3602. Definitions

As used in this subchapter--

(k) "Familial status" means one or more individuals' (who have not attained the age of 18 years) being domiciled with--

> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

> (1) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.
>
> (n) "Respondent" means--
>
> (1) the person or other entity accused in a complaint of an unfair housing practice; and
>
> (2) any other person or entity identified in the course of investigation and

notified as required with respect to respondents so identified under section 3610(a) of this title.

Section 807, 42 U.S.C. §3607. Religious organization or private club exemption

(b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

Section 808, 42 U.S.C. §3608. Administration

(a) Authority and responsibility

The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(c) Delegation of authority; appointment of administrative law judges; location of conciliation meetings; administrative review

The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The person to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department

of Housing and Urban Development in compliance with sections 3105, 3344, 5372, and 7521 of title 5. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his administrative law judges to other administrative law judges or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(d) Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(e) Functions of Secretary

The Secretary of Housing and Urban Development shall--

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter; and

Section 810, 42 U.S.C. § 3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(b) Upon the filing of such a complaint--

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this subchapter;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this subchapter, together with a copy of the original complaint;

(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within100 days after the filing of the complaint (or, when the Secretary takes

further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), unless it is impracticable to do so.

(c) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(d) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

(b) Investigative report and conciliation

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

(5)(A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing--

(i) the names and dates of contacts with witnesses;

(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(iii) a summary description of other pertinent records;

(iv) a summary of witness statements; and

(v) answers to interrogatories.

(B) A final report under this paragraph may be amended if additional evidence is later discovered.

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation and any final investigative report relating to that investigation.

(f) Referral for State or local proceedings

(1) Whenever a complaint alleges a discriminatory housing practice--

(A) within the jurisdiction of a State or local public agency; and

(B) as to which such agency has been certified by the Secretary under this

subsection;
the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless--

(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary

takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action),the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. (2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.
(B) Such charge--

(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and

(iii) need not be limited to the facts or grounds alleged in the complaint filed under section subsection (a) of this section.

(h) Service of copies of charge
After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 3612(a) of this title and the effect of such an election, to be served--

(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

(2) on each aggrieved person on whose behalf

the complaint was filed.

Section 811, 42 U.S.C. § 3611. Subpoenas; giving of evidence

(a) In general

The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this subchapter. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.

(b) Witness fees

Witnesses summoned by a subpoena under this chapter shall be entitled to the same witness and mileage fees as witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpoena issued at the request of a party shall be paid by that party or, where a party is unable to pay the fees, by the Secretary.

(c) Criminal penalties

(1) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if it is in such person's power to do so, in obedience to the subpoena or other lawful order under subsection (a) of this section, shall be fined not more than $100,000 or imprisoned not more than one year, or both.

(2) Any person who, with intent thereby to mislead another person in any proceeding under this subchapter--

(A) makes or causes to be made any false entry or

statement of fact in any report, account, record, or other document produced pursuant to subpoena or other lawful order under subsection (a) of this section; (B) willfully neglects or fails to make or to cause to be made full, true, and correct entries in such reports, accounts, records, or other documents; or (C) willfully mutilates, alters, or by any other means falsifies any documentary evidence; shall be fined not more than $100,000 or imprisoned not more than one year, or both.

Section 812, 42 U.S.C. § 3612. Enforcement by Secretary

(a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(c) Rights of parties

At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 3611 of this title. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

(g) Hearings, findings and conclusions, and order

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(p) Attorney's fees

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 3612 of this title, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.

APPENDIX F

Title 24--Housing and Urban Development
Subtitle B--Regulations Relating to Housing and Urban Development

CHAPTER I--OFFICE OF ASSISTANT SECRETARY FOR EQUAL OPPORTUNITY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SUBCHAPTER A--FAIR HOUSING

PART 103--FAIR HOUSING--COMPLAINT PROCESSING

Subpart A--Purpose and Definitions

Sec. 103.1 Purpose and applicability.

Section 103.1 Purpose and applicability.

(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. 3610.

Section 103.9 Definitions.

The terms Fair Housing Act, General Counsel, and HUD are defined in 24 CFR part 5.

As used in this part,

Personal service means handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business, residence or usual place of abode of the person to be served.

Receipt of notice means the day that personal service is completed by handing or delivering a copy of the document

to an appropriate person or the date that a document is delivered by certified mail.

Section 103.15 Who may file complaints.

Any aggrieved person or the Assistant Secretary may file a complaint no later than one year after an alleged discriminatory housing practice has occurred or terminated. The complaint may be filed with the assistance of an authorized representative of an aggrieved person, including any organization acting on behalf of an aggrieved person.

Section 103.30 Form and content of complaint.

(c) Each complaint must contain substantially the following information:

(1) The name and address of the aggrieved person.

(2) The name and address of the respondent.

(3) A description and the address of the dwelling which is involved, if
appropriate.

(4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice.

Section 103.45 Service of notice on aggrieved person.

Upon the filing of a complaint, the Assistant Secretary will notify, by certified mail or personal service, each aggrieved person on whose behalf the complaint was filed. The notice will:

(a) Acknowledge the filing of the complaint and state the date that the complaint was accepted for filing.

(b) Include a copy of the complaint.

(c) Advise the aggrieved person of the time limits applicable to complaint processing and of the procedural rights and obligations of the aggrieved person under this part and Part 180.

(d) Advise the aggrieved person of his or her right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 180 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(e) Advise the aggrieved person that retaliation against any person because he or she made a complaint or testified, assisted, or participated in an investigation or conciliation under this part or an administrative proceeding under Part 180, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

Section 103.50 Notification of respondent; joinder of additional or substitute respondents.

(a) Within ten days of the filing of a complaint under Sec. 103.40 or the filing of an amended complaint under Sec. 103.42, the Assistant Secretary will serve a notice on each respondent by certified mail or by personal service. A person who is not named as a respondent in a complaint, but who is identified in the course of the investigation under Subpart D of this part as a person who is alleged to be engaged, to have engaged, or to be about to engage in the discriminatory housing practice upon which the complaint is based may be joined as an additional or substitute respondent by service of a notice on the person under this section within ten days of the identification.

(b)(1) The notice will identify the alleged discriminatory housing practice upon which the complaint is based, and

include a copy of the complaint.

(2) The notice will state the date that the complaint was accepted for filing.

(3) The notice will advise the respondent of the time limits applicable to complaint processing under this part and of the procedural rights and obligations of the respondent under this part and Part 180, including the opportunity to submit an answer to the complaint within 10 days of the receipt of the notice.

(4) The notice will advise the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 180 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(5) If the person is not named in the complaint, but is being joined as an additional or substitute respondent, the notice will explain the basis for the Assistant Secretary's belief that the joined person is properly joined as a respondent.

(6) The notice will advise the respondent that retaliation against any person because he or she made a complaint or testified, assisted or participated in an investigation or conciliation under this part or an administrative proceeding under Part 180, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

Section 103.200 Investigations.

(a) Upon the filing of a complaint under Sec. 103.40, the

Assistant Secretary will initiate an investigation. The purposes of an investigation are:

(1) To obtain information concerning the events or transactions that relate to the alleged discriminatory housing practice identified in the complaint.

(2) To document policies or practices of the respondent involved in the alleged discriminatory housing practice raised in the complaint.

(3) To develop factual data necessary for the General Counsel to make a determination under Sec. 103.400 whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and for the Assistant Secretary to make a determination under Sec. 103.400 that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and to take other actions provided under this part.

Section 103.225 Completion of investigation.

The investigation will remain open until a determination is made under Sec. 103.400, or a conciliation agreement is executed and approved under Sec. 103.310. Unless it is impracticable to do so, the Assistant Secretary will complete the investigation of the alleged discriminatory housing practice within 100 days of the filing of the complaint (or where the Assistant Secretary reactivates the complaint, within 100 days after service of the notice of reactivation under Sec. 103.115). If the Assistant Secretary is unable to complete the investigation within the 100-day period, HUD will notify the aggrieved person and the respondent, by mail, of the reasons for the delay.

Section 103.230 Final investigative report.

(c) Notwithstanding the prohibitions and requirements with respect to disclosure of information contained in Sec. 103.330, the Assistant Secretary will make information

derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent. Following the completion of investigation, the Assistant Secretary shall notify the aggrieved person and the respondent that the final investigation report is complete and will be provided upon request.

Section 103.300 Conciliation.

(a) During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel or the Assistant Secretary, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint.

(c) Generally, officers, employees, and agents of HUD engaged in the investigation of a complaint under this part will not participate or advise in the conciliation of the same complaint or in any factually related complaint. Where the rights of the aggrieved party and the respondent can be protected and the prohibitions with respect to the disclosure of information can be observed, the investigator may suspend fact finding and engage in efforts to resolve the complaint by conciliation.

Section 103.330 Prohibitions and requirements with respect to disclosure of information obtained during conciliation.

(a) Except as provided in paragraph (b) of this section and Sec. 103.230(c), nothing that is said or done in the course of conciliation under this part may be made public or used as evidence in a subsequent administrative hearing under Part 180 or in civil actions under Title VIII of the Fair Housing Act, without the written consent of the persons concerned.

(b) Conciliation agreements shall be made public, unless the aggrieved person and respondent request nondisclosure and the Assistant Secretary determines that disclosure is not

required to further the purposes of the Fair Housing Act. Notwithstanding a determination that disclosure of a conciliation agreement is not required, the Assistant Secretary may publish tabulated descriptions of the results of all conciliation efforts.

Section 103.400 Reasonable cause determination.

(a) If a conciliation agreement under Section 103.310 has not been executed by the complainant and the respondent, and approved by the Assistant Secretary, the General Counsel, within the time limits set forth in paragraph (c) of this section, shall determine whether, based on the totality of the factual circumstances known at the time of the decision, reasonable cause exists to believe that discriminatory housing practice has occurred or is about to occur. The reasonable cause determination will be based solely on the facts concerning the alleged discriminatory housing practice, provided by complainant and respondent and otherwise, disclosed during the investigation. In making the reasonable cause determination, the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court.

(1) In all cases not involving the legality of local zoning or land use laws or ordinances:

(i) If the General Counsel determines that reasonable cause exists, the General Counsel will immediately issue a charge under Section 103.405 on behalf of the aggrieved person and shall notify the aggrieved person and the respondent of this determination by certified mail or personal service.

(ii) If the General Counsel determines that no reasonable cause exists, the General Counsel shall issue a short and plain written statement of the facts upon which the General Counsel has based the no reasonable cause determination; dismiss the complaint; notify the aggrieved person and the respondent of

the dismissal (including the written statement of facts) by certified mail or personal service; and make public disclosure of the dismissal. Public disclosure of the dismissal shall be by issuance of a press release, except that the respondent may request that no release be made. Notwithstanding a respondent's request that no press release be issued, the fact of the dismissal, including the names of the parties, shall be public information available on request.

(2) If the General Counsel determines that the matter involves the legality of local zoning or land use laws or ordinances, the General Counsel, in lieu of making a determination regarding reasonable cause, shall refer the investigative materials to the Attorney General for appropriate action under Section 814(b)(1) of the Fair Housing Act, and shall notify the aggrieved person and the respondent of this action by certified mail or personal service.

(b) The General Counsel may not issue a charge under paragraph (a) of this section regarding an alleged discriminatory housing practice, if an aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the alleged discriminatory housing practice, and the trial in the action has commenced. If a charge may not be issued because of the commencement of such a trial, the General Counsel will so notify the aggrieved person and the respondent by certified mail or personal service.

(c)(1) The General Counsel shall make the reasonable cause determination after the Assistant Secretary forwards the matter for consideration. The General Counsel shall make a reasonable cause determination within 100 days after filing of the complaint (or where the Assistant Secretary has reactivated a complaint, within 100 days after service of the notice of reactivation under Section 103.115), unless it is impracticable to do so.

(2) If the General Counsel is unable to make the determination within the 100-day period specified in paragraph (c)(1) of this section, the Assistant Secretary will notify the aggrieved person and the respondent by certified mail or personal service, of the reasons for the delay.

Section 103.405 Issuance of Charge.

(a) A charge:

(1) Shall consist of a short and plain written statement of the facts upon which the General Counsel has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(2) Shall be based on the final investigative report; and

(3) Need not be limited to facts or grounds that are alleged in the complaint filed under subpart B of this part. If the charge is based on grounds that are not alleged in the complaint, HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

(b) Within three business days after the issuance of the charge, the General Counsel shall:

(1) Obtain a time and place for hearing from the Chief Docket Clerk of the Office of Administrative Law Judges;

(2) File the charge along with the notifications described in Sec. 104.410(b) with the Office of Administrative Law Judges;

(3) Serve the charge and notifications in accordance with 24 CFR 104.410(a); and

(4) Notify the Assistant Secretary of the filing of the charge.

Section 104.590. Subpoenas

(a) In General. This section governs the issuance of subpoenas in administrative proceedings under this part.

Except for time periods stated in the section rules, to the extent that this rule conflicts with procedures for the issuance of subpoenas in civil actions in the United States District Court for the District in which the investigation of the discriminatory housing practice took place, the rules of the United States District Court apply.

(b) Issuance of subpoena. Upon the written request of a party, the Chief Administrative Law Judge or the presiding Administrative Law Judge may issue a subpoena requiring (1) The attendance of a witness for the purpose of giving testimony at a deposition; (2) The attendance of a witness for the purpose of giving testimony at a hearing; and (3) The production of relevant books, papers, documents or tangible things.

(c) Time of request. Requests for subpoenas in aid of discovery must be submitted in time to permit the conclusion of discovery 15 days before the date scheduled for the hearing. If a request for subpoenas of a witness for testimony at a hearing is submitted three days or less before the hearing, the subpoena shall be issued at the discretion of the Chief Administrative Law Judge or the presiding Administrative Law Judge, as appropriate.

(d) Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service on a person shall be made by delivering a copy of the subpoena to the person and by tendering witness fees and mileage to that person. When the subpoena is issued on behalf of HUD, witness fees and mileage need not be tendered with the subpoena.

(e) Amount of witness fees and mileage. A witness summoned by a subpoena issued under this part is entitled to the same witness and mileage fees as a witness in proceedings in United States District Courts. Fees payable to a witness summoned by a subpoena shall be paid by the party requesting the issuance of the subpoena, or where the ALJ

determines that a party is unable to pay the fees, the fees shall be paid by the Department.

(f) Motion to quash or limit subpoena. Upon a motion by the person served with a subpoena or by a party, made within five days after service of the subpoena (but in any event not less than the time specified in the subpoena for compliance), the Administrative Law Judge may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; or

(2) Condition denial of the motion upon the advancement, by the party on whose behalf the subpoena was issued, of the reasonable cost of producing subpoenaed books, papers or documents. Where circumstances require, the Administrative Law Judge may act upon such a motion at any time after a copy of the motion has been served upon the party on whose behalf the subpoena was issued.

(g) Failure to comply with subpoena. If a person fails to comply with a subpoena issued under this section, the party requesting the subpoena may refer the matter to the Attorney General for enforcement in appropriate proceedings under Section 814(c) of the Fair Housing Act.

APPENDIX G

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

ANSWER OF RESPONDENT
JOHN T. KELLY TO COMPLAINT

Now comes the Respondent, by and through undersigned counsel, and for his answer to the Complaint, states as follows:

1. Paragraphs 1 through 4 do not require a responsive pleading as same are a recitation of law that may or may not be applicable to this Respondent.

2. Denies for lack of knowledge the allegations contained in Paragraph 5 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

3. Admits that Michael P. Kelly and John T. Kelly are owners of 6300 Montgomery Road, Cincinnati, Ohio, but denies the remaining allegations contained in Paragraph 6.

4. Admits the physical description of the building but denies for lack of knowledge the allegations contained in Paragraph 7 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

5. Denies for lack of knowledge the allegations contained in Paragraph 8 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

6. Denies for lack of knowledge the allegations contained in Paragraph 9 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

7. Denies the allegations contained in Paragraph 10 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

8. Denies for lack of knowledge the allegations contained in Paragraph 11 and is unable to obtain sufficient

information to admit or deny each allegation made in the charge.

9. Denies for lack of knowledge Paragraph 12 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

10. Admits the allegation contained in Paragraph 13 of the Complaint.

11. Denies the allegations contained in Paragraphs 14, 15, 16, 17 and 18 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

12. The Charging Party has failed to obtain service of the initial Complaint or Amended Complaints within the time period required by law. The Respondent was not served with any Complaint or Amended Complaints within the time limits prescribed by 24 CFR Sections 103.40 or 103.50, i.e. within ten days of the filing of the Complaint by the aggrieved party.

SECOND AFFIRMATIVE DEFENSE

13. The Charging Party has failed to serve the Respondent either by certified mail or personal service as required by law. The Charging Party has failed to serve the Respondent with the Complaint or Amended Complaints by certified mail service or by personal service as required by 24 CFR Sections 103.45 and 103.50.

THIRD AFFIRMATIVE DEFENSE

14. The Charging Party's initial Complaint or Amended Complaints fail to allege with specificity the alleged discriminatory housing practice that gives rise to the Complaint or Amended Complaints. The Complaint does not

set forth a refusal to rent due to familial status, even if the Complaint or Amended Complaints are accepted as true.

FOURTH AFFIRMATIVE DEFENSE

15. The Charging Party has used information from a conciliation meeting to obtain evidence as the foundation for the Complaint of the alleged aggrieved party in violation of 24 CFR Section 103.330. The investigatory report at page 4 makes reference to a conciliation conference and a reference to Tab II, D 1, which this Respondent has not been provided, and its contents are unknown.

FIFTH AFFIRMATIVE DEFENSE

16. The Charging Party has failed to conduct an investigation within the requirements of 24 CFR Section 103.200. The investigation based on the information contained in the investigative report demonstrates that no factual data has been obtained as a result of information obtained to document any policy or practice of this Respondent, or that this Respondent was served with a Complaint or Amended Complaints, and therefore the investigator has failed to develop factual data necessary for the General Counsel to make a reasonable cause determination.

SIXTH AFFIRMATIVE DEFENSE

17. The Charging Party has failed to complete its investigation within the time requirements of 24 CFR Section 103.225. The investigation must be completed within "100 days of the filing of the Complaint" or arguably the last Amended Complaint which is dated November 5, 1990. The investigation should have been completed on or before February 13, 1991, or the Respondent is required to be notified by certified mail or personal service. The investigation was not completed within 100 days, and no

notice was sent or served on this Respondent "of the reasons for the delay."

SEVENTH AFFIRMATIVE DEFENSE

18. The Charging Party has failed to notify the Respondent of the completion of the investigatory report or notify the Respondent that it was impracticable to complete the investigative report within 100 days. 24 CFR Section 103.225 requires the Assistant Secretary to notify the Respondent that the final investigation report is completed or that the investigation report would be provided upon request.

EIGHTH AFFIRMATIVE DEFENSE

19. The Charging Party is guilty of laches for failure to promptly investigate, complete the investigatory process, and issue a determination of reasonable cause within the requirements of the Code of Federal Regulations and therefore is barred from any recovery. The Charging Party has failed to complete its investigation within 100 days of the filing of the Complaint or last Amended Complaint or issue a determination of probable cause within 100 days of the filing of the Complaint or the last Amended Complaint.

NINTH AFFIRMATIVE DEFENSE

20. The Charging Party did not initiate or make a probable cause determination within 100 days of the filing of the Complaint or notify Respondent of its failure to do so. The reasonable cause determination was not made until March 2, 1992, which is more than sixteen months from the filing of the last Amended Complaint and without notification from the Assistant Secretary by certified mail or personal service of the reasons for the delay.

TENTH AFFIRMATIVE DEFENSE

21. The Charging Party has failed to join parties

necessary for just adjudication pursuant to Rule 19 and 19.1 of the Federal Rules of Civil Procedure. Kathie Kelly is an owner of the property that is the subject of this dispute, and service of the Complaint, Amended Complaints or Reasonable Cause Determination has not been made on her.

ELEVENTH AFFIRMATIVE DEFENSE

22. The Charging Party has failed, after demand in writing, to provide Respondent with a complete copy of the investigatory report compiled in this proceeding. The Respondent, through counsel, has requested a copy of the investigative report pursuant to 24 CFR Section 103.230, and each investigative report forwarded to counsel or another Respondent did not contain the tabs referenced in the report, thereby constituting a refusal by the Assistant Secretary to provide a complete copy of the investigative report.

TWELFTH AFFIRMATIVE DEFENSE

23. The Charging Party has failed to document with specificity any actions on behalf of this responding party to document a policy or practice related to the Complaint. The investigative report is devoid of any documentation that there was a practice or policy that was discriminatory, or that there was a refusal to rent any apartment in contravention of the Fair Housing Act.

THIRTEENTH AFFIRMATIVE DEFENSE

24. The Charging Party, HUD, has failed to comply with its own rules and regulations (see prior affirmative defenses), thereby barring it from initiating any action against this Respondent until the Charging Party, HUD, complies with same. HUD has failed to fulfill its obligations and cannot initiate action until it complies with its own rules and guidelines.

FOURTEENTH AFFIRMATIVE DEFENSE

25. The Charging Party's Complaint or Determination of Reasonable Cause and Charge of Discrimination fails to state a claim upon which relief can be granted. The apartment was never denied to the alleged aggrieved party by any of the Respondents, and therefore no discriminatory practice existed, then or now.

FIFTEENTH AFFIRMATIVE DEFENSE

26. The Charging Party has failed to notify the Respondents of the basis for the Assistant Secretary's belief that the person is properly joined as a respondent. The Charging Party failed to notify this Respondent of the basis for the Assistant Secretary's belief that he should be joined as a party, nor did the notice identify the alleged discriminatory practice.

SIXTEENTH AFFIRMATIVE DEFENSE

27. Respondent does not now own nor has he ever owned any interest in Michael P. Kelly Realty. This Respondent has not now nor has he ever been an agent, principal or employee of Michael P. Kelly Realty.

SEVENTEENTH AFFIRMATIVE DEFENSE

28. Respondent has never had a contractual relationship or business relationship permitting Michael P. Kelly Realty to represent, rent or lease the real property at 6300 Montgomery Road. Michael P. Kelly Realty does not now or ever has had a contractual relationship for the rental of any properties at 6300 Montgomery Road, Cincinnati, Ohio.

EIGHTEENTH AFFIRMATIVE DEFENSE

29. The Charging Party's damages, if any, which this Respondent specifically denies, are a direct and proximate

result of the Charging Party's contributory negligence. The Charging Party has failed to comply with its own rules, thereby occasioning any loss it may suffer, and the Charging Party's refusal to pursue rental of the unit or submission of a rental application occasioned any loss incurred by the Charging Party.

NINETEENTH AFFIRMATIVE DEFENSE

30. The Charging Party has unclean hands and violated the Respondent's due process rights. The Charging Party has repeatedly failed to notify this Respondent of any proceedings in this matter, thereby depriving him of rights entitled to him pursuant to the 14th Amendment of the Constitution of the United States of America and the laws of the United States of America.

TWENTIETH AFFIRMATIVE DEFENSE

31. The application of the Fair Housing Act to this Respondent is a denial of equal protection to this Respondent, as there is not any uniform application to all geographic cites throughout Hamilton County, not to mention the United States. The application of the Fair Housing Act in one municipality due to minimum space requirements can constitute a violation of the Fair Housing Act, while its application in an adjoining municipality with the same number of potential dwellers would not constitute a violation.

TWENTY-FIRST AFFIRMATIVE DEFENSE

32. The Charging Party has failed to serve the Respondent within the time requirements of 24 CFR Section 103.405. The General Counsel failed to serve the Determination of Reasonable Cause upon the Respondents within three business days of the issuance of the charge.

TWENTY-SECOND AFFIRMATIVE DEFENSE

33. This tribunal lacks subject matter jurisdiction due to the failure of the Charging Party to comply with its own rules and regulations.

TWENTY-THIRD AFFIRMATIVE DEFENSE

34. The Charging Party's Complaint is barred by the statute of limitations for failure to file a claim within applicable time limits.

WHEREFORE, this Respondent, having fully answered the Charging Party's Complaint, requests that it be dismissed at the Charging Party's expense and for such other relief as the Court deems just and proper and for expenses incurred as a result of defending this action.

/s/
ROBERT G. KELLY
State I.D. #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
John T. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was sent by certified mail, return receipt requested, to Konrad J. Rayford, Esq., Attorney Advisor, U.S. Department of Housing and Urban Development, 77 West Jackson Boulevard, Room 2604, Chicago, Illinois 60604-3507, Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development , 451 Seventh Street, S.W., Room 5204, Washington, D. C. 20410, and Michael J. Mooney, Attorney for Dionne Staples, The Nathaniel Ropes Building, 917 Main Street, Cincinnati, Ohio 45202-1314 this 3rd day of April 1992. In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, P.O. Box 44820, Washington, D. C. 20026-4820 by certified mail and a copy by regular mail on the foregoing date.

/s/ _____
ROBERT G. KELLY

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

ANSWER OF RESPONDENT
MICHAEL P. KELLY TO COMPLAINT

Now comes the Respondent, by and through undersigned counsel, and for his answer to the Complaint, states as follows:

1. Paragraphs 1 through 4 do not require a responsive pleading as same are a recitation of law that may or may not be applicable to this Respondent.

2. Denies for lack of knowledge the allegations contained in Paragraph 5 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

3. Admits that Michael P. Kelly and John T. Kelly are owners of 6300 Montgomery Road, Cincinnati, Ohio, but denies the remaining allegations contained in Paragraph 6.

4. Admits the physical description of the building but denies for lack of knowledge the allegations contained in Paragraph 7 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

5. Denies for lack of knowledge the allegations contained in Paragraph 8 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

6. Denies for lack of knowledge the allegations contained in Paragraph 9 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

7. Denies the allegations contained in Paragraph 10 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

8. Denies for lack of knowledge the allegations contained in Paragraph 11 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

9. Denies for lack of knowledge Paragraph 12 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

10. Admits the allegation contained in Paragraph 13 of the Complaint.

11. Denies the allegations contained in Paragraphs 14, 15, 16, 17 and 18 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

12. The Charging Party has failed to obtain service of the initial Complaint or Amended Complaints within the time period required by law. The Respondent was not served with any Complaint or Amended Complaints within the time limits prescribed by 24 CFR Sections 103.40 or 103.50, i.e. within ten days of the filing of the Complaint by the aggrieved party.

SECOND AFFIRMATIVE DEFENSE

13. The Charging Party has failed to serve the Respondent either by certified mail or personal service as required by law. The Charging Party has failed to serve the Respondent with the Complaint or Amended Complaints by certified mail service or by personal service as required by 24 CFR Sections 103.45 and 103.50.

THIRD AFFIRMATIVE DEFENSE

14. The Charging Party's initial Complaint or Amended Complaints fail to allege with specificity the alleged discriminatory housing practice that gives rise to the Complaint or Amended Complaints. The Complaint does not set forth a refusal to rent due to familial status, even if the Complaint or Amended Complaints are accepted as true.

FOURTH AFFIRMATIVE DEFENSE

15. The Charging Party has used information from a conciliation meeting to obtain evidence as the foundation for the Complaint of the alleged aggrieved party in violation of 24 CFR Section 103.330. The investigatory report at page 4 makes reference to a conciliation conference and a reference to Tab II, D 1, which this Respondent has not been provided, and its contents are unknown.

FIFTH AFFIRMATIVE DEFENSE

16. The Charging Party has failed to conduct an investigation within the requirements of 24 CFR Section 103.200. The investigation based on the information contained in the investigative report demonstrates that no factual data has been obtained as a result of information obtained to document any policy or practice of this Respondent, or that this Respondent was served with a Complaint or Amended Complaints, and therefore the investigator has failed to develop factual data necessary for the General Counsel to make a reasonable cause determination.

SIXTH AFFIRMATIVE DEFENSE

17. The Charging Party has failed to complete its investigation within the time requirements of 24 CFR Section 103.225. The investigation must be completed within "100 days of the filing of the Complaint" or arguably the last Amended Complaint which is dated November 5, 1990. The investigation should have been completed on or before February 13, 1991, or the Respondent is required to be notified by certified mail or personal service. The investigation was not completed within 100 days, and no notice was sent or served on this Respondent "of the reasons for the delay."

SEVENTH AFFIRMATIVE DEFENSE

18. The Charging Party has failed to notify the Respondent of the completion of the investigatory report or notify the Respondent that it was impracticable to complete the investigative report within 100 days. 24 CFR Section 103.225 requires the Assistant Secretary to notify the Respondent that the final investigation report is completed or that the investigation report would be provided upon request.

EIGHTH AFFIRMATIVE DEFENSE

19. The Charging Party is guilty of laches for failure to promptly investigate, complete the investigatory process, and issue a determination of reasonable cause within the requirements of the Code of Federal Regulations and therefore is barred from any recovery. The Charging Party has failed to complete its investigation within 100 days of the filing of the Complaint or last Amended Complaint or issue a determination of probable cause within 100 days of the filing of the Complaint or the last Amended Complaint.

NINTH AFFIRMATIVE DEFENSE

20. The Charging Party did not initiate or make a probable cause determination within 100 days of the filing of the Complaint or notify Respondent of its failure to do so. The reasonable cause determination was not made until March 2, 1992, which is more than sixteen months from the filing of the last Amended Complaint and without notification from the Assistant Secretary by certified mail or personal service of the reasons for the delay.

TENTH AFFIRMATIVE DEFENSE

21. The Charging Party has failed to join parties necessary for just adjudication pursuant to Rule 19 and 19.1 of the Federal Rules of Civil Procedure. Kathie Kelly is an owner of the property that is the subject of this dispute, and

service of the Complaint, Amended Complaints or Reasonable Cause Determination has not been made on her.

ELEVENTH AFFIRMATIVE DEFENSE

22. The Charging Party has failed, after demand in writing, to provide Respondent with a complete copy of the investigatory report compiled in this proceeding. The Respondent, through counsel, has requested a copy of the investigative report pursuant to 24 CFR Section 103.230, and each investigative report forwarded to counsel or another Respondent did not contain the tabs referenced in the report, thereby constituting a refusal by the Assistant Secretary to provide a complete copy of the investigative report.

TWELFTH AFFIRMATIVE DEFENSE

23. The Charging Party has failed to document with specificity any actions on behalf of this responding party to document a policy or practice related to the Complaint. The investigative report is devoid of any documentation that there was a practice or policy that was discriminatory, or that there was a refusal to rent any apartment in contravention of the Fair Housing Act.

THIRTEENTH AFFIRMATIVE DEFENSE

24. The Charging Party, HUD, has failed to comply with its own rules and regulations (see prior affirmative defenses), thereby barring it from initiating any action against this Respondent until the Charging Party, HUD, complies with same. HUD has failed to fulfill its obligations and cannot initiate action until it complies with its own rules and guidelines.

FOURTEENTH AFFIRMATIVE DEFENSE

25. The Charging Party's Complaint or Determination of Reasonable Cause and Charge of

Discrimination fails to state a claim upon which relief can be granted. The apartment was never denied to the alleged aggrieved party by any of the Respondents, and therefore no discriminatory practice existed, then or now.

FIFTEENTH AFFIRMATIVE DEFENSE

26. The Charging Party has failed to notify the Respondents of the basis for the Assistant Secretary's belief that the person is properly joined as a respondent. The Charging Party failed to notify this Respondent of the basis for the Assistant Secretary's belief that he should be joined as a party, nor did the notice identify the alleged discriminatory practice.

SIXTEENTH AFFIRMATIVE DEFENSE

27. Respondent has never had a contractual relationship or business relationship permitting Michael P. Kelly Realty to represent, rent or lease the real property at 6300 Montgomery Road. Michael P. Kelly Realty does not now or ever has had a contractual relationship for the rental of any properties at 6300 Montgomery Road, Cincinnati, Ohio.

SEVENTEENTH AFFIRMATIVE DEFENSE

28. The Charging Party's damages, if any, which this Respondent specifically denies, are a direct and proximate result of the Charging Party's contributory negligence. The Charging Party has failed to comply with its own rules, thereby occasioning any loss it may suffer, and the Charging Party's refusal to pursue rental of the unit or submission of a rental application occasioned any loss incurred by the Charging Party.

EIGHTEENTH AFFIRMATIVE DEFENSE

29. The Charging Party has unclean hands and

violated the Respondent's due process rights. The Charging Party has repeatedly failed to notify this Respondent of any proceedings in this matter, thereby depriving him of rights entitled to him pursuant to the 14th Amendment of the Constitution of the United States of America and the laws of the United States of America.

NINETEENTH AFFIRMATIVE DEFENSE

30. The application of the Fair Housing Act to this Respondent is a denial of equal protection to this Respondent, as there is not any uniform application to all geographic cites throughout Hamilton County, not to mention the United States. The application of the Fair Housing Act in one municipality due to minimum space requirements can constitute a violation of the Fair Housing Act, while its application in an adjoining municipality with the same number of potential dwellers would not constitute a violation.

TWENTIETH AFFIRMATIVE DEFENSE

31. The Charging Party has failed to serve the Respondent with a copy of the determination of reasonable cause in conformity of 24 CFR Section 103.405. The Charging Party has repeatedly failed to serve the Respondent at his last known address or residence. The Charging Party does not have service upon this Respondent.

TWENTY-FIRST AFFIRMATIVE DEFENSE

32. This tribunal lacks subject matter jurisdiction due to the failure of the Charging Party to comply with its own rules and regulations.

TWENTY-SECOND AFFIRMATIVE DEFENSE

33. The Charging Party's Complaint is barred by the statute of limitations for failure to file a claim within applicable time limits.

WHEREFORE, this Respondent, having fully answered the Charging Party's Complaint, requests that it be dismissed at the Charging Party's expense and for such other relief as the Court deems just and proper and for expenses incurred as a result of defending this action.

/s/

ROBERT G. KELLY
State I.D. #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
Michael P. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was sent by certified mail, return receipt requested, to Konrad J. Rayford, Esq., Attorney Advisor, U.S. Department of Housing and Urban Development, 77 West Jackson Boulevard, Room 2604, Chicago, Illinois 60604-3507, Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development , 451 Seventh Street, S.W., Room 5204, Washington, D. C. 20410, and Michael J. Mooney, Attorney for Dionne Staples, The Nathaniel Ropes Building, 917 Main Street, Cincinnati, Ohio 45202-1314 this 3rd day of April 1992. In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, P.O. Box 44820, Washington, D. C. 20026-4820 by certified mail and a copy by regular mail on the foregoing date.

/s/_____
ROBERT G. KELLY

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

MOTION OF RESPONDENT JOHN T. KELLY TO DISMISS DETERMINATION OF REASONABLE CAUSE AND CHARGE OF DISCRIMINATION AND REQUEST FOR A PROTECTIVE ORDER

Now comes the Respondent, by and through undersigned counsel, and moves the Court for an order dismissing the Determination of Reasonable Cause and Charge of Discrimination and for a Protective Order that he not be required to answer or otherwise respond to any request for discovery of any kind. The interrogatories, requests for admissions and request for production of documents are unduly burdensome, and the Charging Party did not perfect service of the initial complaint on the Respondent.

/S/_____
ROBERT G. KELLY (0002167)
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent John T. Kelly

MEMORANDUM

I. FAILURE TO SERVE THE COMPLAINT WITHIN TEN DAYS OF FILING

The Charging Party is required to serve within ten days of the filing of the complaint notice of the complaint on a Respondent by certified mail or personal service. 24 CFR 103.50. The Code of Federal Regulations defines personal service as "handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business. . . " 24 CFR 103.9. The regulations governing this action further require that if a person is not named in the complaint but is being joined as an additional or substitute Respondent, the notice will explain the basis for the Assistant Secretary's

belief that the person is properly joined as a Respondent. 24 CFR 103.50.

In the instant case, the Charging Party has not served this Respondent by certified mail or personal service and cannot produce a scintilla of proof that service was made. This Respondent works in the same building as the investigator and yet service was neither attempted nor perfected at Respondent's place of business. It is clear that the Charging Party's service of the complaint or amended complaint is defective, and whether this Respondent had actual knowledge of the action does not cure the defective service. Friedman vs. Estate of Jackie Presser, 929 F. 2d 1151 (6th Circuit 1991).

The Charging Party is required to serve the Respondent within ten (10) days of the filing of the complaint or amended complaint naming him as a party. In the instant case, the complaint naming this individual as a Respondent was filed May 17, 1990, and should have been served upon him by certified mail or personal service on or before May 27, 1990. Arguably, it would be splitting hairs if the discussion centered on a delay of seven or fourteen days. In this case, the discussion concerns a delay of six hundred ninety-seven days as of April 23, 1992, and it continues to grow daily.[11]

The procedural deficiency and the failure of HUD to follow its own rules has resulted in significant injury to this Respondent. This Respondent has been denied the opportunity to respond to the charge or participate in any conciliation with the knowledge that he was a named party as

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[11] Calculated as follows:
May 27, 1990 through December 31, 1990 = 218 days
January 1, 1991 through December 31, 1991 = 365 days
January 1, 1992 through April 23, 1992 = 114 days

countenanced by the Fair Housing Act and effectively denied this Respondent his due process rights. It is not the responsibility of this Respondent to seek out HUD or any government-regulatory agency to secure service of process. Baumgardner vs. The Secretary, United States Department of Housing and Urban Development, No. 91-3039, 6th Circuit, 1992.[12] Moreover, although the Court in the Baumgardner case dealt with an "inadequate and insufficient statutory notice," this Court must concern itself with a case in which there has been no statutory notice. Certainly due process at the bare minimum requires "notice" as contemplated in the Code of Federal Regulations.

HUD'S investigator attempted service of the first amended complaint by sending it to 3330 Erie Avenue. This address is the location of Michael P. Kelly Realty. This Respondent has no business or contractual relationship with Michael P. Kelly Realty. This Respondent replied to the amended complaint with indignation, because he perceived that he was providing assistance to Michael P. Kelly when he was broadsided by the knowledge that he was named as a Respondent. Although the complaint came into the hands of the Respondent, he was not served in accordance with the regulations. To date, this Respondent has not been served with the second amended complaint naming James Kelly as an additional Respondent.

II. FAILURE TO COMPLETE INVESTIGATION WITHIN 100 DAYS

The regulations governing these actions require that the investigation be completed within one hundred (100) days of the filing of the complaint. This period can be extended if

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[12]The same investigator is involved in the instant case as in the Baumgardner case.

the Assistant Secretary notifies the aggrieved person and the Respondent. 24 CFR 103.225.

The record in this action indicates that the initial complaint was filed with HUD on May 17, 1990, an amended complaint filed on or about July 27, 1990, and the final amended complaint filed November 5, 1990, naming this James Kelly as an additional party. The Assistant Secretary was required to complete the investigation within 100 days of November 5, 1990, unless this Respondent was notified by certified mail of the reason why the investigation could not be completed within that time frame. This Respondent did not receive any notification as to why the investigation could not be completed within 100 days, nor any notification that the final investigative report was completed as required by 24 CFR 103.225 and 103.230.

The circumstances involving this deficiency are distinctly different from those of the Baumgardner case. In Baumgardner, at least the Respondent received some notice, even though untimely, that the investigation would not be completed in 100 days. In the instant case, HUD continued merrily along with total indifference to the compulsory notice process with regard to this Respondent. Since HUD did not feel compelled to provide this Respondent with notice of the complaint in compliance with its regulations, one can only assume that HUD perceived notice of any delay in the investigatory process to be superfluous. Although the Baumgardner court stated that a little delay is not bad, there is a total absence of any notice in this case. One wonders if a delay of four hundred thirty-six days without notice is sufficient to trigger a Court's sense of indignation.[13]

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[13] The figure was calculated on the assumption that notice of the complaint was provided to this Respondent, which is not the case.February 13, 1991 through February 13, 1992 =

Certainly this tribunal does not disregard the requirements in the Code of Federal Regulations concerning notices to make elections, discovery cut-off dates and answer dates. The question that requires an answer in this instance: Why wink at or disregard investigation times? The haphazard selection of regulations that will be enforced and those that will not be enforced imperils this Respondent at the hands of a government agency that does not even comply with its own regulations. Evidently HUD has embarked on a system of "Do as I say, not as I do." Certainly to countenance this type of slipshod investigation and failure to comply with its regulations will only reinforce an attitude within HUD that the rules are made to apply to outsiders but not to the agency.

III. FAILURE TO MAKE REASONABLE CAUSE DETERMINATION WITHIN 100 DAYS OF FILING OF COMPLAINT

Section 103.400 of the Code of Federal Regulations is specific and mandatory that the General Counsel shall make a reasonable cause determination within 100 days of the filing of the complaint. In the event that the General Counsel is unable to do so, the Assistant Secretary must notify the aggrieved person and the Respondent by certified mail or personal service of the reasons for the delay. 24 CFR 103.400 (c) (2).

The record in this case demonstrates from the Charging Party's complaint or determination of reasonable cause that it has failed to meet or comply with its own regulations. The reasonable cause determination was issued over one year from the date that the investigation should have been completed and over fifteen months from the last

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365 days February 14, 1992 through April 23, 1992 = 70 days
435 days

amended complaint and twenty-two months from the filing of the initial complaint. There is nothing in the file to indicate that any reason for such a delay was communicated to this Respondent as required by the agency's own regulations. It is even more alarming when the Respondent works three floors below the investigator, and the investigator is fully aware of this Respondent's place of employment.

This heedlessness by HUD continues a pattern of absolute disregard of its own regulations. The recipient of the investigatory report, if in fact it was timely completed[14], sat on the investigatory report and did not issue any notice to this Respondent of the reason for the delay. This conduct should not be a shock to any reviewer of this case, based simply on the facts that there is no notice of the complaint, no notice that the investigatory report was complete and no notice of the cause for delay. The action of the person or tribunal who determined reasonable cause only perpetuated a track record of indifference to this Respondent's due process rights, the Code of Federal Regulations and the Fair Housing Act. Bureaucrats should not be allowed to operate in total derogation of the law with no oversight and total impunity.

IV. HUD IS BARRED FROM ISSUING CHARGE OR REASONABLE CAUSE DETERMINATION

Section 103.405 of Title 24 of the Code of Federal Regulations is very specific about the requirements concerning the issuance of charge. Paragraph 3 of the foregoing section states:

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[14]The incomplete investigatory report was undated and not signed, therefore making it difficult to determine when the investigatory report was completed.

> ....HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

Prior to any action by HUD, it must make a determination that the initial complaint was served in accordance with 24 CFR 103.50.

The record in this matter demonstrates that not only was this Respondent not served, but also that he was thus not provided an opportunity to respond to the allegation. It would appear that HUD's heedless indifference to its own regulations would necessitate dismissal on this ground alone.

The precipitous action of HUD to file a determination of reasonable cause perpetuates a callous disregard of the due process rights of this Respondent. Basic due process dictates that a tenant who is evicted from his apartment is entitled to notice and an opportunity to be heard prior to the termination of his tenancy rights. In the instant case, HUD has deprived this Respondent of his due process rights in absolute derogation of the Respondent's rights entitled by the Code of Federal Regulations and the Fair Housing Act. HUD has failed to give this Respondent notice, and therefore, this charge must be dismissed. To hold otherwise would be to further wink at the strictness of the regulations. If this regulation is not enforced, nothing remains to ensure this Respondent's basic due process rights.

V. FAILURE TO SERVE THE REASONABLE CAUSE DETERMINATION IN COMPLIANCE WITH SECTION 103.405 OF THE CODE OF FEDERAL REGULATIONS

Section 103.405 of the Code of Federal Regulations requires the General Counsel within three business days to, among other requirements:

> (3) Serve the charge and notifications in accordance with 24 CFR 104.40....

Section 104.40 specifies that service of documents may be made by personal service or by mailing a copy to the last known address. The key issue in this section is "last known address" and whether the Charging Party knew or even had the remotest idea of the address of this Respondent.

This Respondent has not received one complaint from the Charging Party in compliance with the regulations. No complaints have been served on him personally or by certified mail. Certainly, the threshold issue concerning the necessity of a party's participation, response to a complaint or requirement to appear should be predicated on notice to him in compliance with the law. It is incumbent upon this tribunal to definitely state that enough is enough. No notice of the complaint, no contact concerning the investigation, no chance for conciliation, no investigative report completed in 100 days of the filing of the complaint or last amended complaint, no notice of extension to complete the investigatory report, no reasonable cause determination completed within 100 days of the complaint or last amended complaint, no notice of need for extension to determine reasonable cause, and to place the cherry on the top of this treat, HUD failed to serve this Respondent with the Determination of Reasonable Cause in

compliance with its regulations. How in the world anyone could even entertain the reasonable cause determination in light of the foregoing atrocities at the expense of the Respondent's due process rights is incomprehensible. Ask not for whom the bell tolls, it tolls for this Respondent's due process rights which have been trampled upon by a bureaucratic process out of control.

In conclusion, this case has been under consideration by HUD for over twenty-three months without service of the complaint upon this Respondent. Elephants have been conceived and born during this time period, yet HUD cannot deliver a notice to this Respondent that a complaint was filed against this Respondent, even though this Respondent works three floors below the investigator. The actions of HUD should neither be condoned nor encouraged by permitting this process to proceed. If the Sixth Circuit was "seriously troubled" in Baumgardner by HUD deficiencies in carrying out statutory proceedings, it will be absolutely appalled by this travesty. This Respondent should be dismissed for all the foregoing reasons.

VI. PROTECTIVE ORDER ARGUMENT

The Respondent has filed a Motion to Dismiss that challenges the jurisdiction and procedures used to bring this case before this tribunal. There are serious and substantial questions concerning the denial of this Respondent's due process rights, and the necessity to respond to the substantive issues involved in this proceeding without first addressing the Respondent's Motion to Dismiss will cause the Respondent to incur unnecessary expense and place a tremendous burden on this Respondent.

Further, this Respondent has not been served with any documents concerning this proceeding. This Respondent has retained an attorney to answer the charge and assert defenses because of the actions of HUD to totally and completely

trample and violate rights secured by the Constitution of the United States of America. This Respondent has not waived any rights and has challenged the jurisdiction of this proceeding among other defenses that he has asserted to this acion.

The Charging Party has inundated this Respondent with discovery requests (Interrogatories, Production of Documents and Requests for Admissions) that are unduly burdensome to this Respondent who has not been properly served by the Charging Party. The Interrogatories are duplicative for each named Respondent. This Respondent strenuously objects to each Interrogatory due to lack of service and to Interrogatory Nos. 11, 12, 13, 14, 15 and 16 as being totally irrelevant to this action, as the only property that is the subject of this action is 6300 Montgomery Road, Cincinnati, Ohio. The Charging Party has embarked upon a fishing expedition to discover other properties owned by this Respondent that are not the subject of this complaint. Interrogatory Nos. 7, 8 and 9 seek to discover the work product of counsel and further violates the attorney-client privilege. Interrogatory No. 28 is the ultimate abuse of the discovery process, as the information is totally irrelevant to the cause of action. Interrogatory No. 27 is understandable, provided there is
service, but No. 28 is purely burdensome and has no evidentiary value.

The Charging Party's request for admissions is another broad-based request to all Respondents. The requests are not relevant to all Respondents and to this Respondent in particular. Once again there is no service on this Respondent, but he is expected to expend time and money to respond.

The Charging Party's Request for Production of Documents is the most burdensome of all the discovery requests. Request No. 4 seeks all documents for the property at 6300 Montgomery Road, Cincinnati, Ohio. Once again,

the only apartment that is the subject of this no-service complaint is No. 10. The Charging Party desires this Respondent to duplicate voluminous records for apartments and tenants that are not the subject of this complaint for a three-year period. Requests Nos. 5 and 7 build upon the outlandish request in No. 4. The Charging Party seeks information of all rental units owned by this Respondent, none of which are the subject of this complaint. Request No. 8 asks this Respondent to produce oral statements. How can the Respondent produce an oral statement? Request No. 11 seeks information subject to the attorney-client privilege, which is not discoverable, and therefore, this Respondent objects.

This Respondent is incurring legal expenses to defend this action that are mounting daily. The duplication costs and fees necessary to reply to the discovery request will only exacerbate a situation that is absolutely and totally out of control. Service on this Respondent has never been perfected, yet HUD is penalizing him by requiring him to expend monies to respond to discovery requests. Due process requires the intervention of this tribunal to halt the abuse of this Respondent's due process rights. HUD is absolutely out of control, and the failure of this tribunal to intervene will cause this Respondent's damages to grow.

This Respondent incorporates by reference his Motion to Dismiss and Memorandum in support of this Motion for a Protective Order. The Memorandum in support of the Motion to Dismiss articulates grave procedural defects that substantially prejudice this Respondent's due process rights and have prejudiced him in making a defense to the merits of the Complaint.

/S/_____
ROBERT G. KELLY
Attorney Registration #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
John T. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by regular U.S. mail on the _____day of _____, 1992, to the following individuals:

Konrad J. Rayford, Esq.
Attorney Advisor
U.S. Department of Housing and
Urban Development
77 West Jackson Boulevard, Room 2604
Chicago, Illinois 60604-3507

Gordon H. Mansfield
Assistant Secretary for Fair
Housing and Equal Opportunity
U.S. Department of Housing and
Urban Development
451 Seventh St., S.W., Room 5204
Washington, D. C. 20410

Michael J. Mooney, Esq.
Attorney for Dionne Staples
The Nathaniel Ropes Building
917 Main Street
Cincinnati, Ohio 45202-1314

In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, 409 3rd Street, S. W., Suite 320, Washington, D. C. 20024 by certified mail and a copy by regular mail on the foregoing date.

/S/_____
ROBERT G. KELLY

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

MOTION OF RESPONDENT MICHAEL P. KELLY TO DISMISS DETERMINATION OF REASONABLE CAUSE AND CHARGE OF DISCRIMINATION AND REQUEST FOR A PROTECTIVE ORDER

Now comes the Respondent, by and through undersigned counsel, and moves the Court for an order dismissing the Determination of Reasonable Cause and Charge of Discrimination and for a Protective Order that he not be required to answer or otherwise respond to any request for discovery of any kind. The interrogatories, requests for

admissions and request for production of documents are unduly burdensome and the Charging Party did not perfect service of the initial complaint on the Respondent.

/S/_____
ROBERT G. KELLY (0002167)
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
Michael P. Kelly

MEMORANDUM

I. FAILURE TO SERVE THE COMPLAINT WITHIN TEN DAYS OF FILING

The Charging Party is required to serve within ten days of the filing of the complaint notice of the complaint on a Respondent by certified mail or personal service. 24 CFR 103.50. The Code of Federal Regulations defines personal service as "handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business . . ."24 CFR 103.9. The regulations governing this action further require that if a person is not named in the complaint but is being joined as an additional or substitute Respondent, the notice will explain the basis for the Assistant Secretary's belief that the person is properly joined a Respondent. 24 CFR 103.50.

In the instant case, the Charging Party has not served this Respondent by certified mail or personal service and cannot produce a scintilla of proof that service was made.

The service of the initial complaint was made upon Michael P. Kelly Realty, which is not an entity. It is clear that the Charging Party's service of the complaint or amended complaint is defective, and whether this Respondent had actual knowledge of the action does not cure the defective service. Friedman vs. Estate of Jackie Presser, 929 F. 2d 1151 (6th Circuit 1991).

The Charging Party is required to serve the Respondent within ten (10) days of the filing of the complaint or amended complaint naming him as a party. In the instant case, the complaint naming this individual as a Respondent was filed May 17, 1990, and should have been served upon him by certified mail or personal service on or before May 27, 1990. Arguably, it would be splitting hairs if the discussion centered on a delay of seven or fourteen days. In this case, the discussion concerns a delay of six hundred ninety-seven days as of April 23, 1992, and it continues to grow daily.[15]

The procedural deficiency and the failure of HUD to follow its own rules has resulted in significant injury to this Respondent. It is not the responsibility of this Respondent to seek out HUD or any government regulatory agency to secure service of process. Baumgardner vs. The Secretary, United States Depart-ment of Housing and Urban Development, No. 91-3039, 6th Circuit, 1992.[16] Moreover, although the Court in the Baumgardner case dealt with an "inadequate and

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[15] Calculated as follows:
May 27, 1990 through December 31, 1990 = 218 days
January 1, 1991 through December 31, 1991 = 365 days
January 1, 1992 through April 23, 1992 = 114 days

[16] The same investigator is involved in the instant case as in the Baumgardner case.

insufficient statutory notice, " this Court must concern itself with a case in which there has been no notice. Certainly due process at the bare minimum requires "notice" as contemplated in the Code of Federal Regulations.

HUD's investigator attempted service of the complaint by sending it to 3330 Erie Avenue. This address is the location of Michael P. Kelly Realty. Michael P. Kelly Realty is not a legal entity that can receive process. Although the complaint came into the hands of this Respondent, he was not served in accordance with the regulations. This Respondent has never been served with the second amended complaint naming James Kelly as an additional respondent.

II. FAILURE TO COMPLETE INVESTIGATION WITHIN 100 DAYS

The regulations governing these actions require that the investigation be completed within one hundred (100) days of the filing of the complaint. This period can be extended if the Assistant Secretary notifies the aggrieved person and the Respondent. 24CFR 103.225.

The record in this action indicates that the initial complaint was filed with HUD on May 17, 1990, an amended complaint filed on or about July 27, 1990, and the final amended complaint filed November 5, 1990, naming James Kelly as an additional party. The Assistant Secretary was required to complete the investigation within 100 days of November 5, 1990, unless this Respondent was notified by certified mail of the reason why the investigation could not be completed within that time frame. This Respondent did not receive any notification as to why the investigation could not be completed within 100 days, nor any notification that the final investigative report was completed as required by 24 CFR 103.225 and 103.230.

The circumstances involving this deficiency are distinctly different from those of the Baumgardner case. In

Baumgardner, at least the Respondent received some notice, even though untimely, that the investigation would not be completed in 100 days. In the instant case, HUD continued merrily along with total indifference to the compulsory notice process with regard to this Respondent. Since HUD did not feel compelled to provide this Respondent with notice of the complaint in compliance with its regulations, one can only assume that HUD perceived notice of any delay in the investigatory process to be superfluous. Although the Baumgardner court stated that a little delay is not bad, there is a total absence of any notice in this case, in accordance with the regula-tions. One wonders if a delay of four hundred thirty-six days without notice is sufficient to trigger a Court's sense of indignation.[17] Certainly this tribunal does not disregard the requirements in the Code of Federal Regulations concerning notices to make elections, discovery cut-off dates and answer dates. The question that requires an answer in this instance: Why wink at or disregard investigation times? The haphazard selection of regulations that will be enforced and those that will not be enforced imperils this Respondent at the hands of a government agency that does not even comply with its own regulations. Evidently HUD has embarked on a system of "Do as I say, not as I do." Certainly to countenance this type of slipshod investigation and failure to comply with its regulations will only reinforce an attitude within HUD that the rules are made to apply to outsiders
but not to the agency.

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[17] Thefigure was calculated on the assumption that notice of the complaint was provided to this Respondent, which is not the case. February 13, 1991 through February 13, 1992 = 365 days February 14, 1992 through April 23, 1992 = 70 days 435 days

III. FAILURE TO MAKE REASONABLE CAUSE DETERMINATION WITHIN 100 DAYS OF FILING OF COMPLAINT

Section 103.400 of the Code of Federal Regulations is specific and mandatory that the General Counsel shall make a reasonable cause determination within 100 days of the filing of the complaint. In the event that the General Counsel is unable to do so, the Assistant Secretary must notify the aggrieved person and the Respondent by certified mail or personal service of the reasons for the delay. 24 CFR 103.400 (c) (2).

This record in this case demonstrates from the Charging Party's complaint or determination of reasonable cause that it has failed to meet or comply with its own regulations. The reasonable cause determination was issued over one year from the date that the investigation should have been completed and over fifteen months from the last amended complaint and twenty-two months from the filing of the initial complaint. There is nothing in the file to indicate that any reason for such a delay was communicated to this Respondent as required by the agency's own regulations. It is even more alarming when the investigator is fully aware of this Respondent's place of employment.

This heedlessness by HUD continues a pattern of absolute dis-regard of its own regulations. The recipient of the investigatory report, if in fact it was timely completed[18], sat on the investigatory report and did not issue any notice to this Respondent of the reason for the delay. This conduct should not be a shock to any reviewer of this case, based simply on the facts that there is no notice of the complaint, no

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[18]The incomplete investigatory report was undated and not signed, therefore making it difficult to determine when the investigatory report was completed.

notice that the investigatory report was complete and no notice of the cause for delay. The action of the person or tribunal who determined reasonable cause only perpetuated a track record of indifference to this Respondent's due process rights, the Code of Federal Regulations and the Fair Housing Act. Bureaucrats should not be allowed to operate in total derogation of the law with no oversight and total impunity.

IV. HUD IS BARRED FROM ISSUING CHARGE OR REASONABLE CAUSE DETERMINATION

Section 103.405 of Title 24 of the Code of Federal Regulations is very specific about the requirements concerning the issuance of a charge. Paragraph 3 of the foregoing section states:

> . . . HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

Prior to any action by HUD, it must make a determination that the initial complaint was served in accordance with 24 CFR 103.50.

The record in this matter demonstrates that the Respondent was not served. It would appear that HUD's heedless indifference to its own regulations would necessitate dismissal on this ground alone.

The precipitous action of HUD to file a determination of reasonable cause perpetuates a callous disregard of the due process rights of this Respondent. Basic due process dictates that a tenant who is evicted from his apartment is entitled to notice and an opportunity to be heard prior to the termination of his tenancy rights. In the instant case, HUD has deprived this Respondent of his due process rights in absolute

derogation of the Respondent's rights entitled by the Code of Federal Regulations and the Fair Housing Act. HUD has failed to give the Respondent notice, and therefore, this charge must be dismissed. To hold otherwise would be to further wink at the strictness of the regulations. If this regulation is not enforced, nothing remains to ensure this Respondent's basic due process rights.

V. FAILURE TO SERVE THE REASONABLE CAUSE DETERMINATION IN COMPLIANCE WITH SECTION 103.405 OF THE CODE OF FEDERAL REGULATIONS

Section 103.405 of Title 24 of the Code of Federal Regulations requires the General Counsel within three business days to, among other requirements:

> (3) Serve the charge and notifications in accordance with 24 CFR 104.40 . . .

Section 104.40 specifies that service of documents may be made by personal service or by mailing a copy to the last known address. The key issue in this section is "last known address" and whether the Charging Party knew or even had the remotest idea of the address of this Respondent.

This Respondent has not received one complaint from the Charging Party in compliance with the regulations. No complaints have been served on him personally or by certified mail. Certainly, the threshold issue concerning the necessity of a party's participation, response to a complaint or requirements to appear should be predicated on notice to him in compliance with the law. It is incumbent upon this tribunal to definitely state that enough is enough. No notice of the complaint, no investigative report completed in 100 days of the filing of the complaint or last amended complaint, no notice of extension to complete the investi-gatory report, no

reasonable cause determination completed within 100 days of the complaint or last amended complaint, no notice of need for extension to determine reasonable cause, and to place the cherry on the top of this treat, HUD failed to serve the Respondent with the Determination of Reasonable Cause in compliance with its regulations. How in the world anyone could even entertain the reasonable cause determination in light of the foregoing atrocities at the expense of the Respondent's due process rights is incompre-hensible. Ask not for whom the bell tolls, it tolls for this Respondent's due process rights which have been trampled upon by a bureaucratic process out of control.

In conclusion, this case has been under consideration by HUD for over twenty-three months without service of the complaint upon this Respondent. Elephants have been conceived and born during this time period, yet HUD cannot deliver a notice to this Respondent that a complaint was filed. The actions of HUD should neither be condoned nor encouraged by permitting this process to proceed. If the Sixth Circuit was "seriously troubled" in Baumgardner by HUD deficiencies in carrying out statutory proceedings, it will be absolutely appalled by this travesty. This Respondent should be dismissed for all the foregoing reasons.

VI. PROTECTIVE ORDER ARGUMENT

This Respondent has filed a Motion to Dismiss that challenges the jurisdiction and procedures used to bring this case before this tribunal. There are serious and substantial questions concerning the denial of this Respondent's due process rights, and the necessity to respond to the substantive issues involved in this proceeding without first addressing the Respondent's Motion to Dismiss will cause the Respondent to incur unnecessary expense and place a tremendous burden on this Respondent.

Further, this Respondent has not been served with any

documents concerning this proceeding. This Respondent has retained an attorney to answer the charge and assert defenses because of the actions of HUD to totally and completely trample and violate rights secured by the Constitution of the United States of America. The Respondent has not waived any rights and has challenged the jurisdiction of this proceeding among other defenses that he has asserted to this action.

The Charging Party has inundated the Respondent with discovery requests (Interrogatories, Production of Documents and Requests for Admissions) that are unduly burdensome to a Respondent who has not been properly served by the Charging Party. The Interrogatories are duplicative for each named Respondent. The Respondent strenuously objects to each Interrogatory due to lack of service and to Interrogatory Nos. 11, 12, 13, 14, 15 and 16 as being totally irrelevant to this action, as the only property that is the subject of this action is 6300 Montgomery Road, Cincinnati, Ohio. The Charging Party has embarked upon a fishing expedition to discover other properties owned by this Respondent that are not the subject of this complaint. Interrogatory Nos. 7, 8 and 9 seek to discover the work product of counsel and further violates the attorney-client privilege. Interrogatory No. 28 is the ultimate abuse of the discovery process, as the information is totally irrelevant to the cause of action. Interrogatory No. 27 is understandable, provided there is service, but No. 28 is purely burdensome and has no evidentiary value.

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requests. Request No. 4 seeks all documents for the property at 6300 Montgomery Road, Cincinnati, Ohio. Once again, the only apartment that is the subject of this no-service complaint is No. 10. The Charging Party desires this Respondent to duplicate voluminous records for apartments and tenants that are not the subject of this complaint for a three-year period. Requests Nos. 5 and 7 build upon the outlandish request in No. 4. The Charging Party seeks information of all rental units owned by this Respondent, none of which are the subject of this complaint. Request No. 8 asks the Respondent to produce oral statements. How can the Respondent produce an oral statement? Request No. 11 seeks information subject to the attorney-client privilege, which is not discoverable, and there-fore, Respondent objects.

This Respondent is incurring legal expenses to defend this action that are mounting daily. The duplication costs and fees necessary to reply to the discovery request will only exacerbate a situation that is absolutely and totally out of control. Service on this Respondent has never been perfected, yet HUD is penalizing him by requiring him to expend monies to respond to discovery requests. Due process requires the intervention of this tribunal to halt the abuse of this Respondent's due process rights. HUD is absolutely out of control, and the failure of this tribunal to intervene will cause this Respondent's damages to grow.

This Respondent incorporates by reference his Motion to Dismiss and Memorandum in support of this Motion for a Protective Order. The Memorandum in support of the Motion to Dismiss articulates grave procedural defects that substantially prejudice this Respondent's due process rights and have prejudiced him in making a defense to the merits of the Complaint.

/S/_____
ROBERT G. KELLY
Attorney Registration #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
Michael P. Kelly

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ROBERT G. KELLY